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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Patrick C. Fant, III, Circuit Court Judge

Appellate Case No. 2025-000367

The State of South Carolina — Respondent,

v.

Zachary David Hughes — Appellant.

INITIAL BRIEF OF APPELLANT ZACHARY DAVID HUGHES

Respectfully submitted,

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2. Did the trial court err when it improperly commented on the facts and evidence by instructing the jury that if one plans or prepares to kill another than one acts with malice for the purpose of Murder?

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12. Did the trial court err when it denied Hughes' directed verdict motions on the harassment and conspiracy to commit harassment charges because the State presented no evidence that Parcell suffered mental or emotional distress and no evidence of a non-legitimate purpose?

STATEMENT OF THE CASE

Christina Parcell and her boyfriend/fiancé,' Bradly Post, sexually abused Parcell's young daughter, AM, for years. See *infra*, at p.15. AM was powerless to stop the abuse: the Family Court placed AM with her mother. Her father, John Mello, was in Italy and would be arrested if he reentered the United States. See *infra*, at p. 15. Zachary Hughes, for reasons that will become clearer, knew that Christina Parcell and/or Post were sexually abusing AM, and he killed Parcell to save AM.

Hughes surrendered to police on November 1, 2021, after they located DNA on Parcell's

body that they believed matched his. See *infra,,* at p. 23. Hughes remained in jail without bond for more than three years awaiting trial.

On February 10, 2025, jury selection began, and the trial court heard pretrial motions. Tr., at 2. Hughes' trial began on February 11, 2025, and the State tried Hughes on indictments for murder, possession of a weapon during the commission of a violent crime, burglary first degree, harassment,[1] and conspiracy. Tr., at 182. The defense rested on February 20, 2025, and the jury returned verdicts of guilty on murder, possession of a weapon during the commission of a violent crime, burglary first degree, harassment second degree, and conspiracy to harass in the second degree on the same day. Tr., at 1159-60.

The Court then immediately sentenced Hughes to life imprisonment on the murder indictment, life imprisonment on the burglary first degree indictment, five years concurrent on the possession of weapon indictment, and 30 days times served on each of the harassment second degree and conspiracy to commit harassment in the second degree indictments, both of which were to run concurrently. Tr., at 1170-71.

STATEMENT OF THE FACTS[2]

Christina Parcell and Bradly Post sexually abused Parcell's young daughter, AM, for years. Tr., at 863-67, and R _____. Parcell and John Mello, though never married, were the parents of AM, who was born in 2012. Mello and Parcell had multiple, bitter custody disputes involving AM, with Mello prevailing into 2021.

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[1] In the trial court's opening instructions, it did not specifically tell the jury that the State charged Hughes with Harassment First Degree or Second Degree. It just told the jury that he would be tried on an indictment alleging "harassment." Tr., at 182.

[2] Due to the number of issues Hughes raises on appeal and the fact-intensive nature of these issues, he will supplement his arguments with especially relevant facts when necessary.

During one of these custody disputes in 2016, Mello's lawyer deposed Parcell. Tr., at 985. R. _____. According to Zachary Hughes' testimony, he learned from the deposition that (1) Parcell was a prostitute,[3] offering sexual services in return for money; (2) she was an actress in a pornographic movie; and (3) she used a website with a url of sugardaddyforme.com, wherein women would seek out older men in trade. Tr., at 986. R.___.

Post, age 65, and Parcell, age 41, were engaged at the time of Parcell's death in October of 2021. Tr., at 651. Post was retired, having sold a business for millions of dollars. Tr., at 141-42. Post and Parcell began dating in 2016, although they had known each other for much longer, Tr., at 142, and the two had an on-again off-again relationship for years. Tr., at 144.

Mello became concerned about AM's safety in the presence of Post when Parcell had visitation with AM. He reported his concerns to the Greenville County Sheriff's Office (GCSO) at the end of 2017/beginning of 2018, and Investigator Dan Bevill was assigned to the case. Tr., at 868. Ultimately, Bevill closed the case without finding any abuse, and he sent email to Mello in March of 2018, notifying him that the case was closed. Tr., at 868-69. The evidence would later show that Bevill made a terrible mistake.

<u>Mello and AM meet Hughes and Mello takes AM to Italy</u>

Hughes, a Juilliard trained concert pianist, met Mello and AM in downtown Greenville in August of 2020 while Hughes was performing on a streetcorner during the Covid pandemic. Tr., at 953. Mello and Hughes struck up a friendship, and Hughes was able to interact with Mello and AM repeatedly in August, September, and into October of 2020.

In October of 2020, AM was on a trip with her mother, and Hughes and Mello went to

[3] Defense admitted defense exhibit 56, an affidavit executed by Alex Field, a now-deceased firefighter, who stated under oath that Parcell propositioned him in 2018 for sex in exchange for money. Tr., at 988-89. R__.

dinner to celebrate Hughes's birthday. Tr., at 956. What started as a festive evening ended on a somber note. Mello told Hughes he was "terrified about the danger his daughter was in" whenever she was alone with her mother. Tr., at 957. AM returned to Greenville very shortly after Hughes's birthday, and Mello took AM to Italy, in large part to protect her from her mother and Post, even though his action violated a court order. Tr., at 958.

Parcell travels to Italy and secures AM's return to her and Post, and Hughes tries to save AM

Shortly after Mello and AM left for Italy, Parcell began traveling to Italy, obtained a lawyer, and petitioned the Italian courts to order that AM be returned to the United States. Tr., at 396-99. During this period, Parcell relied largely on Post for her living expenses and for the costs associated with her litigation with Mello: Post gave Parcell credit cards, he was paying credit card bills for Parcell, he allowed her to drive his car, he paid for her family court lawyer in the United States, and he paid for some of her expenses associated with her court battles in Italy. Tr., at 147-48, 153-54. Ultimately, the Italian courts granted Parcell's petition, and she and AM returned to Post and to the United States in April of 2021. Tr., at 420.

Mello began contacting Hughes from Italy in April of 2021, worried that Post and Parcell would continue to victimize AM. Mello shared with Hughes information that caused him to be concerned for AM's safety. Based on Mello's recitation of the facts and Parcell's personality traits, which dovetailed perfectly with Hughes's sociopathic Russian sister, based on documentary evidence Mello provided Hughes that demonstrated Parcell was a prostitute and relied on Post financially, and based on Hughes's personal observations of AM, he became convinced that Parcell and/or Post were sexually abusing AM. Tr., at 997-98.

Once convinced of the danger to AM, Hughes tried to save her. He sent mailers to Parcell's neighbors and Post's acquaintances that contained sexually explicit online escort ads

depicting Parcell, Tr., at 1000-01; he executed an affidavit alleging that AM should live her with father, which he gave to Mello's lawyer to be submitted to the family court, tr., at 1003-04; and he called DSS ("Child Protective Services") and reported that Parcell was abusing AM, tr., at 1004. Despite all of his attempts to save AM, nothing worked.

On October 13, 2021, with Mello stranded in Italy and subject to arrest upon his return to the United States, tr., at 567, with all of his attempts to save AM having failed, and with AM living with her abuser, her own mother, Hughes did what he believed he had to do to save AM: he took Parcell's life.

> Q: And ultimately, did you take Christina Parcell's life on October 13th?
>
> A: Yes. Because I believed it was absolutely necessary to save (AM). And I was right.

Tr., at 1015. (Emphasis added).

On October 19, 2021, police interviewed Post, and he surrendered his cell phone. On the cell phone, police found thousands of images and videos of child pornography, many of which depicted Parcell and AM nude together in provocative poses, tr., at 863-65. See also, R._____ Post was arrested immediately. Police found more device(s), both at Post's home and at a storage locker at a cigar bar Post used, that contained nude photographs of Parcell and AM. These images revealed that Parcell and Post were abusing AM from at least January 1, 2018, through October 19, 2021, within the period Mello reported the abuse to the police, and Bevill failed to uncover it. Tr., at 864-65. Continuing on October 19th, Bevill immediately took steps to take AM into emergency protective custody (EPC) upon learning of these images: he sent another deputy to AM's home in the middle of the night to remove her from it.

On October 20, 2021, Bevill participated in a hearing before the Family Court to have AM taken into EPC, and the Family Court held that AM should be taken into EPC. Tr., at 866-

67. "[U[nder 63-7-620, . . . the law required that the law enforcement officer ( ) establish probable cause that the child's life, health or physical safety is or was in substantial and imminent danger if the child was not taken into emergency protective custody." (Emphasis added). Tr., at 866-67. Even though Parcell had been dead for seven days and Post was in jail, the Family Court still presumably found imminent danger on October 20, 2021.

Bevill also obtained numerous warrants for Post for sexual exploitation of a minor, criminal sexual conduct, and buggery. Tr., at 863-68, 167-69. The warrants were based on images like the following:

> (Bevill) would testify that one of the images depicted Christina Parcell manipulating her daughter's private parts with her fingers. He would also testify that he believed that Brad Post was an active participant in this act due to the photo being taken in Brad Post's house and for other reasons.

Tr. at 867.

Pre-Trial Proceedings

Jury selection occurred and hearings on pretrial motions began on February 10, 2025. The parties thoroughly briefed, both before and during trial, issues they anticipated arising.[4] "I have spent an inordinate amount of time not this morning but because I did have briefs previously, well-written briefs from defense and the State. So I just want it noted that I have thoroughly looked at everything, spent a lot of time on it." Tr., at 831.

Prior to trial, the State sought to exclude all of the evidence of the child pornography police seized from Post's devices that depicted Parcell and AM and which clearly demonstrated that she was imminent danger. Defense counsel strongly urged the trial court to deny the State's request, at least until the trial had started and Hughes tried to introduce it.

[4] The Court allowed the parties to submit, ex parte, pretrial briefs, and Zack's pretrial brief is enclosed at R _____. Zack's other filed briefs on pertinent pretrial motions and on the defense of others are enclosed at R _____.

> [E]xtraordinary relief they are seeking. 16,000 or more images of child pornography. We have photographs. We have videos. They want Your Honor, without having seen any of it, without having it introduced at trial, any exhibits whatsoever, to categorically exclude 16,000 or more pieces of evidence that we may or may not seek to introduce. So they want Your Honor, again, to – from the bench, without any evidence introduced of any kind, without opening statements, with nothing, they want Your Honor to exclude that evidence. . . . But, Your Honor, to -- again, in a vacuum, to exclude this evidence before Your Honor's had a chance to review it, before it's even offered into evidence, I'm not even sure how you do the 403 analysis, right, because it's such a fact-intensive analysis.

Tr., at 99-100.

After hearing argument from the lawyers, the trial court granted the State's motion to exclude all child pornography evidence categorically and prevented Hughes from even attempting to introduce this evidence before the jury.

> I've spent a considerable amount of time looking at case law, these excellent briefs that have been presented to me, your oral arguments. And I am going to grant the State's motion -- amended motion in limine, and I am going to exclude any reference to child pornography involving the victim, her juvenile daughter, I think it's (AM), or Bradly Post. So I'm going to be excluding that. And that also includes the cross-examination of Mr. Post. . . . I know that we've talked with counsel as far as your ability to do a proffer. . . .

Tr., at 121.[5]

As a corollary of the trial court's categorical ruling on the child pornography evidence, it also ruled that defense counsel could not cross-examine Post on which pending charges he had and the possible penalties he faced if convicted. Defense counsel argued, "the law in South Carolina is crystal clear that when a State's witness is cross-examined and he has pending charges, he can be asked about what those charges are and what the penalties are." Tr., at 106. The trial court disagreed, in part because the Attorney General's Office was prosecuting Post instead of the

[5] The trial court offered to allow the parties to revisit the admissibility of the child pornography if it became "relevant," but immediately excluded it again for the purpose of cross-examination of Post. Tr., at 121-22. As this Court will see, the trial court made up its mind before the trial started: under no circumstances would the child pornography be admissible. No way, no how.

Solicitor's Office (even though both represented the same party, the State), and because Post's testimony was not inculpatory enough to warrant this type of vigorous cross-examination.

> [T]he Attorney General's Office will handle this (Post's) trial, not the Greenville solicitor's office. He's not a cooperating witness. He's not providing any type of inculpatory, I guess, evidence linking the defendant to the crime. So they're not offering him in any way to -- like I said, to inculpate the defendant of any type of wrongdoing or indication of guilt.

Tr.. at 122.

The trial court then conducted an *in camera* hearing, pursuant to *State v. Lawrence*, to determine to which, if any questions, Post would assert his 5th Amendment right to remain silent. Post testified on direct examination, *inter alia*, that he supported Parcell in her custody battle with Mello, tr., at 137, and that he and/or Parcell told police in the Summer of 2021 that John Mello was the only person who had access to the nude photos of Parcell that Hughes mailed.[6]

During cross-examination, the following exchange took place between Post and defense counsel:

> Defense Counsel: Isn't it true that you worked with Ms. Parcell to create and distribute child pornography?
>
> State: Objection, You Honor.
>
> Post: ***No***.
>
> The Court: Sustained. It's part of the proffer.

Tr. at 176 (emphasis added).

When Post finished his testimony, defense counsel argued that the trial court should revisit its ruling excluding evidence of child pornography in light of Post's false and unequivocal denial of producing it.

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[6] These photographs formed the basis of the harassment offense(s), for which the State charged Zack and Mello and complimented the State's inculpatory theory of liability for Zack and Mello.

> Your Honor, when he -- had he asserted the Fifth, that would be one thing. But he has affirmatively denied engaging in that activity which goes straight to his credibility because we have evidence to show the contrary. And it's our position that Mr. Post now has opened the door to being cross-examined on his working with Ms. Parcell for the purpose of producing, disseminating and possessing child pornography. . . . We're not calling Mr. Post. They've chosen to call him. So it's not like we're asking to call him just to get all this out. This is the State's witness. This is the State's witness which affirmatively made a representation that is untrue, that we have evidence to rebut.

Tr., at 178, 180. Further, defense counsel argued that the scope of Post's direct-examination went well beyond what the State represented it would be, which also opened the door to the child pornography. Tr., at 178-79. The trial court refused to revisit its ruling. "I'm not going back, and I'm not going to change my earlier ruling." Tr., at 180. See also n. 5, s*upra* at p. 17.

The Trial

The State called Post early on in its case-in-chief. In one of its first questions, the State asked Post "have you been charged with a crime?" "Yes," he responded. Tr., at 213. State also asked Post questions about the custody dispute between Mello and Parcell, his financial and emotional support of Parcell during her attempts to bring AM back from Italy, when and how Post found Parcell's body on October 13, 2021, Post's receipt of nude photos of Parcell in the mail in the Summer of 2021, his and Parcell's meeting with Investigator Bevill about the mailers, and Mello's exclusive possession of the nude photos of Parcell in the mailers. Tr., at 213-29.

Defense counsel cross-examined Post, but, pursuant to the Court's order, was unable to ask Post any questions about the nature of his pending charges, the possible penalties they carried, or any questions about his false denial, during his pretrial testimony, of producing and distributing child pornography with Parcell.

Later in the State's case, the State called Investigator John Garrett with the GCSO. Garrett testified that while in Parcell's home on October 13th he seized "a white plastic bag with a white powder substance in the living room near the front door." Tr., at 257. The State then

showed Garrett State's exhibit 37, a photo of the bag with powder in the home, and State's exhibit 9, what the State claimed was the actual bag with the white powder. When it sought to introduce both into evidence, defense counsel objected to exhibit 9's introduction. "I don't think the full foundation has been laid --- has been completed for 9 in order to be entered into evidence," defense counsel said, and the trial court agreed. Tr., at 259.

Garrett testified that he field-tested the substance, and he later entered it into property and evidence at the Law Enforcement Center. Tr., at 260. Garrett never testified that he sealed the bag with powder prior to depositing it into property and evidence. The State then moved exhibit 9 into evidence again. Both at the time the State sought to introduce State's exhibit 9 and even now, no evidence exists in the record that shows who received the bag in property and evidence, who and how many people handled the bag in property and evidence and the condition of the bag when these people handled it. Defense counsel objected. "There hasn't been a full chain established yet throughout the continuation of where that evidence went. So until that happens, we would have an objection to it being entered." Tr., at 260. The trial court admitted the bag, State's exhibit 9, over defense counsel's objection. Tr., at 260.

Next, the State called Kristen McCall, forensic chemist, as an expert to opine on the identity of the substance in State's exhibit 9. McCall testified about her procedure for obtaining evidence for testing.

> Because when I receive my stuff, I make sure it's sealed by the officer. And if it's not, it goes back down to Property and Evidence because you want to make sure your evidence is sealed because that means that somebody could have tampered with it. So if it was open, I take it back down to Property and I say, "I'm not working this item. You need to get the officer to fix this." So when it gets fixed, I will go back down there and I will get the item. . . .

Tr., at 270. McCall never testified as to whether the bag she obtained for testing, State's exhibit 9, was sealed when she got it from property and evidence or if she had to return it so the officer

could "fix it," meaning it was open when she received it. McCall also never testified about who handled the bag in property and evidence or what was done with the bag in property and evidence prior to her receipt of it. Finally, McCall never testified as to the identity of the person who sealed the bag.

Defense counsel objected when the State asked McCall to give an opinion as to what the substance in State's exhibit 9 was. Tr., at 271-72. Specifically, defense counsel argued that the bag had not been properly authenticated pursuant to S.C.R.E. 901 because an insufficient chain of custody had been established, and, therefore, any opinion about the substance in the bag had no probative value and should be excluded pursuant to S.C.R.E. 403. Tr., at 271-72. The trial court overruled the objection and allowed McCall to opine before the jury. Tr., at 272.

Vanessa Kormylo served as the guardian ad litem for AM in Parcell's and Mello's most recent custody case, and the State called her as its last witness on day two of the trial. Kormylo testified that she had received pornographic photos of Parcell in her office via U.S. mail. She also testified about her participation in the custody dispute. Surprisingly, on direct examination, the State elicited the following testimony from Kormylo:

> State: Had you been asked to make the recommendation, would you have recommended (AM) to stay with Christina Parcell?
>
> Kormylo: Yes. . . . [M]y position is that she was thriving there. . . . [S]he was doing so well in her mother's custody. . . . ***So at the time, yes, that would have been my recommendation if we had gone to trial before the mother's murder.***

Tr., at 492 (emphasis added).

After Kormylo finished her direct examination, defense counsel, outside the presence of the jury, argued that the State had "opened the door" to the child pornography evidence.

> Your Honor it would be our position that (the State's) questions to Ms. Kormylo clearly now make the child pornography evidence completely admissible. In her direct examination, (the State) asked numerous questions about her views as to where (AM)

> should be at different points while she was the appointed guardian ad litem. Specifically, she – (the State) asked Ms. Kormylo if in -- up until the time of Ms. Parcell's passing asked Ms. Kormylo basically would you have a recommendation as to where AM should live. And Ms. Kormylo specifically testified at the time -- at the time, my recommendation would be basically that she should be with Ms. Parcell. At the time. She qualified that. . . . Ms. Kormylo testified that, based on what she knew at that time, that the child was thriving. She used the word "thriving."

Tr., at 499-500.

> But when she gives those facts and she also testified as how long her appointment was and she testifies that afterwards she was in court to talk about the placement for AM, that expands the scope of relevance easily into the questions about, all right, what did you think after the passing of Ms. Parcell? What did you learn afterwards? What did you become aware of that may have altered your recommendation prior to her passing? All those -- all that information, all that testimony has opened the door wide open . . . .

Tr., at 501. Again, the trial court refused to allow the child pornography evidence to be admitted, but allowed defense counsel to proffer evidence from Kormylo.

> Defense counsel: If you knew then that Christina Parcell was producing and engaged in the production of child pornography with her daughter, would you have a different view?
>
> Kormylo: Yes.
>
> Defense counsel: In fact, isn't it true that if you knew then what you know now, you would have gotten her out of that house -- out of her custody as soon as you could? Isn't that true?
>
> Kormylo: I probably would have gotten Christina out of the house since it was Tina's house and I would have wanted her to have custody.
>
> Defense counsel: But you would have separated her from her mother as quickly as possible; isn't that true?
>
> Kormylo: Yes.

Tr., at 507.[7]

[7] During the arguments in connection with Kormylo's testimony, the State repeated its false assertion that sexual abuse allegations against Parcell were "unfounded." Tr., at 507. To which defense counsel responded, "And I'm happy to move those images in right now for the purpose of the proffer so Your Honor can respond to that. I'm happy to provide you with that evidence." Tr., at 507-08. Even in the context of a proffer, the trial court refused to allow defense counsel to

The last witness the State called was a DNA expert, Dr. Nafziger. During his testimony, the State asked Nafziger numerous questions about the samples he tested, more than 20, and presented him with exhibits that contained these samples. Tr., at 783-84. At one point, Nafziger attempted to opine that item 2-A, fingernail clippings from Parcell's right hand, contained Hughes' DNA. Tr., at 789-90. Defense counsel objected prior to Nafziger giving his opinion. "Your Honor, and I'm going to object pursuant to Rule 403. It's our position this has no probative value based on their inability to properly establish chain pursuant to 901." Tr., at 789. The trial court overruled the objection, and Nafziger gave the opinion.

The State rested its case on Friday, February 14th.

Motions at the Close of the State's Case

Defense counsel moved for a directed verdict on multiple bases. In the context of the harassment charges, defense counsel argued that the State had failed to introduce any evidence on an essential element of the charges. "So what the State must prove in part is . . . that the pattern of intentional intrusion caused the person to suffer mental or emotional distress. The person listed in the indictment for harassment is Christina Parcell. Your Honor, based on my recollection and the notes of this record, there is absolutely no evidence that Christina Parcell did, in fact, suffer mental or emotional distress." Tr., at 799 (emphasis added). The only evidence the State cited in response was that Parcell went to law enforcement. Tr., at 800-01. Defense counsel responded. "There is no evidence. And the fact that the only evidence that the State references is that she went to the police is grossly insufficient. People go to the police all the time who are not

introduce them to rebut the State's false assertion. "Not at this moment. Not at this time." Tr., at 508.

under emotional distress." Tr., at 802. The trial court denied Hughes' Motions for directed verdict both on the harassment issue as well as the remaining charges.

The Defense Case

On Tuesday, February 18, 2025, the trial resumed. Over the weekend, the State filed a motion to exclude any evidence or argument Hughes might offer to establish the defense of others defense. Tr., at 811, 814. In response, Hughes filed a pleading entitled, "Response to the State's Motion to Prevent the Defendant from Defending Himself."[8]

In arguing that the defense of others defense was not available to Hughes, the State relied in large part on the fact that AM was not in the home when Hughes killed Parcell. Tr., at 815. In response, defense counsel argued that Hughes stood in AM's shoes and was subject to the same rights and limitations as AM would have. Tr., at 819. Defense counsel also painstakingly explained the evidence they would seek to introduce on each and every element of the defense of others and specifically addressed AM's absence from the home. Defense counsel characterized the case "as extraordinary" because, in part, there was evidence that AM was in imminent danger, see *supra* at p. 16 (Bevill's actions on October 19, 2021, and the Family Court's actions on October 20, 2021), even though AM was not home at the time of Parcell's death. Defense counsel concluded by saying,

> Your Honor. . . if there is any evidence to support a defense, then the Court must instruct the jury on that defense. . . . [N]ot only do we have some evidence, we have compelling evidence that would trigger the State's obligation to disprove one of the elements of self-defense and defense of others beyond a reasonable doubt.

Tr., at 826. The trial court, after hearing additional argument, denied Hughes the ability to assert the defense of others as a defense.

[8] This pleading is part of the record on appeal at R. _____.

Defense counsel then pivoted and argued that the same facts associated with the defense of others, specifically the sexual abuse that AM was suffering at the hands of her own mother and Post, would still be admissible to disprove an essential element of murder, malice.

> We believe this evidence is admissible to show that -- obviously, defense of other's Your Honor has ruled, but also to show that Mr. Hughes did not have what (the State) referred to in his opening statement as an angry heart, that he was mad. We believe that this evidence is entirely appropriate to show that he did not have malice. He went in there for the purpose of protecting (AM). And so for that reason, we do believe, despite Your Honor's ruling on the defense of others, this evidence is still highly relevant, highly probative for the purpose of establishing that Hughes did not have malice.

Tr., at 835. After hearing arguments from the State, the trial court excluded this evidence even in the context of disproving malice. In fact, the trial court went so far as to bar Hughes from telling the jury in his direct testimony why he did what he did!

> Defense counsel: So just so I understand, and so the State is arguing and Your Honor is ruling that Mr. Hughes cannot even explain to the jury why he did what he did if he testifies.
>
> Court: Essentially, within the limitations of State v. Cottrell, that's exactly what I'm saying.

Tr., at 839-40.

Defense counsel continued to voice his objection to the trial court's ruling, even characterizing it as "astonishing."

> Defense counsel: So -- and, Your Honor, I just – this is so important. So he's on trial for his freedom, for his life and he can't tell this jury why he did what he did. He can't tell them the full truth as to what happened. That is just -- that's <u>astonishing</u>, Your Honor. I can't believe that that would be consistent with the law and his rights of due process. He's on trial. . . .
>
> Court: It gets into limiting on this whole issue that I've ruled on on the defense of others. And it is limiting his testimony with regard to that issue.

Tr, at 841 (emphasis added).

Towards the end of the exchange, the trial court revealed that it had already concluded for itself that Hughes acted with malice.

> Defense counsel: I just think that is so critical that he be allowed to explain to this jury why -- if he decides to testify why he did what he did. It totally undercuts malice, totally undercuts the State's theory of the case. In fact, again, (the State) in (its) opening statement, said he had an angry heart, quote, angry heart. He was mad. He wasn't mad. He's going to testify I wasn't mad if he decides to take the stand. So, I mean, that goes -- goes directly to malice. That completely ---
>
> Court: ***He wasn't mad when he stabbed 35 times?***
>
> Defense counsel: And that's for the jury to decide. That's not -- with all due respect, that's not for Your Honor to decide. That's for the jury to decide. And so ---
>
> Court: I've made my ruling, Mr. Moorman.

Tr., at 841. (Emphasis added).

Defense counsel made Hughes' opening statement to the jury on Tuesday, February 18, 2025.[9] At this point, the trial court had almost completely gutted Hughes' defense: it had refused to allow Hughes to assert the defense of others or even call witnesses and introduce evidence to attempt to establish the defense, it had precluded the introduction of any and all child pornography evidence (without even allowing defense counsel to attempt to introduce one exhibit before the jury) even though two of the State's witnesses had opened the door to this testimony, and it even ordered that Hughes could not reference the child pornography or sexual abuse should he decide to testify. Denied these defenses, defense counsel forged ahead and referenced in opening statement the only limb on which Hughes had left to hold, "just cause" in the context of malice.

> The why to the homicide is very important because it gives insight into the person's heart. In this case, you are going to hear that the why was not jealousy or greed or a crime of passion or some other emotion. You're going to hear that Hughes did not act like an angry heart like the prosecutor conjectured. You're going to hear that this was not done for money or any other personal gain or benefit, not to help out any kind of friend. You're

[9] Monday, February 17, 2025, was a state holiday.

going to hear that this was done for a just cause. And that's not malice and that's not murder.

Tr., at 848.

After Hughes' opening statement, defense counsel attempted to call witnesses both to illustrate to the trial court that Hughes did have evidence which would establish the defense of others and undercut the State's proof of malice and to preserve the record for this Appellate Court. However, the trial court refused to allow defense counsel to call any of these witnesses but one,[10] instead ordering defense counsel to summarize this evidence.

For example,

Defense counsel: So, Your Honor, prior to us calling Mr. Tsangarides, he's the owner of Outman's Cigar Bar, he found -- after Brad Post's arrest, he found more electronic devices that contained child pornography. So that would be the purpose of calling him. And as I indicated, he's here and ready to be called.

Court: Okay. And as I instructed you, you will be allowed to proffer a summary of his testimony. So you're protected.

Defense counsel: Thank you. So Your Honor has instructed us we're not allowed to call him, but we can provide Your Honor a summary of it. Is that -- --

Court: That's correct.

Tr., at 870-71.

The only purely defense witness, other than Hughes, the trial court allowed to testify, albeit outside the presence of the jury, was Dr. David Corwin. Corwin, a psychiatrist from Utah, and one the world's foremost experts on child sexual abuse. Corwin provided evidence that

[10] The trial court did allow defense counsel to call Investigator Dan Bevill in the defense case in addition to Dr. Corwin. However, Bevill did not testify about any evidence that the defense would use to support its defense of others defense, and, instead, defense counsel summarized what his testimony would be outside the presence of the jury.

clearly demonstrated that AM was in imminent danger of continued sexual abuse at the hands of her mother and Post.

> What's mostly in the literature is high rates of recidivism of adults. . . .But there's a real addictive quality to this kind of sexual behavior with children. And so the concerns are with recidivism and how difficult it is to stop people from doing this.

Tr., at 920. He also testified that the danger AM faced put her at risk for serious bodily injury or even death.

> And so we now know that child sexual abuse is one of the most toxic of the major stressors that a child can experience, broadly termed childhood adversities, and that it causes all of those harms including increased risk for suicide, suicidal ideations, suicide completion substance abuse which too often ends in death. . . . And we even have different studies that show which of the brain structures appear to be most affected by sexual abuse:[11] the amygdala, which is a small part of the brain that's involved in processing threat and danger. The hippocampus is another area that's shown differences between sexually abused and nonabused children. Also some cortical areas. So there's a lot of very significant impacts, and we don't have good evidence that we can reverse many of these effects. It just appears that as these things are experienced and enter memory, the impacts accumulate. And so it's concerning.

Tr., at 908, 910.

Defense counsel called Hughes as their final witness, and prior to testifying he swore an oath to tell the truth, the whole truth, and nothing but the truth. Tr., at 931. Hughes' direct testimony was lengthy: he discussed his childhood, his passion for and success in piano performance, his service in the military, his meeting AM and her father in the Summer of 2020, his growing concerns about AM's safety, all the steps he took to try to protect her short of killing Parcell, the events that occurred on October 13, 2021, and after, culminating in returning to Greenville from Detroit, within sight of Canada, to self-surrender to police.

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[11] See e.g., S.C. Code Ann. § 16-11-430 (defining "Great bodily injury" for stand your ground purposes as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ.") (Emphasis added).

During Hughes' testimony, the State objected repeatedly anytime it believed Hughes was about to mention the concept of sexual abuse, regardless of the context, and the trial court sustained these objections. The trial court sustained the State's objections, even when Hughes attempted to testify about what he was thinking at a particular juncture, evidence that clearly would assist the jury in assessing his intent and undercutting the State's proof of malice.

> Defense counsel: After you had done all these things to act on your concerns and nothing had been done, tell this jury, in early October of 2021, what's going on in your mind? What are you thinking?
>
> Hughes: I was still in the middle of this music project so I had a lot on my plate there just professionally. And, of course, I was continuing giving -- increasing my support to help John save his daughter (AM). And since June when I had returned, I had been absolutely convinced that Christina Parcell was sexually abusing her daughter.
>
> State: Your Honor, let's go. I mean ---
>
> Court: Take the jury out.

Tr., at 1007.

At the State's request, the trial court admonished Hughes and gave him the following instruction.

> Mr. Hughes, I stated this to you earlier, but do you understand that you are not supposed to reference anything concerning child pornography or sexual abuse for the remainder of your testimony? Do you understand that, sir?

Tr., at 1010. So, the trial court ordered Hughes not to discuss child pornography or sexual abuse under any circumstances for the "remainder of (his) testimony" no matter what: it did not matter if the State opened the door on cross-examination, and it did not matter if he referenced it in the context of what he was thinking or believed. With this instruction, the trial court categorically and prospectively barred Hughes from even mentioning these two topics.

Hughes recognized the impracticality of the order, and he was completely honest with the trial court when the trial court inquired of him if he understood the order.

Hughes: I understand.

Court: And you can abide by that instruction.

Hughes: I will do my best, Your Honor.

Court: Not do my best. You need to abide by that instruction.

Hughes: Your Honor, I put my hand on the Bible and made an oath to tell the whole truth. I'm a little confused.

Tr., at 1010-11.

Later in his testimony, Hughes was describing what and how he felt when he left Parcell's home on October 13, 2021. "I felt the most enormous wave of relief wash over me because I knew from that moment on, (AM) would be safe. "AM would be safe from the sexual abuse that her mother was perpetrating on her, and there is proof to that that the State is hiding from you." Tr., at 1031. In response, the trial court held Hughes in contempt of court for violating its order and sentenced him to six months imprisonment. Tr., at 1036.

Hughes' direct examination concluded on February 19, 2025.

The Jury Instruction Conference

The parties and the trial court conducted a jury instruction conference first thing on February 20th. Defense counsel requested an instruction on "malice" in the context of murder. R.___. The most relevant portion of the instruction defined "malice" as "the doing of a wrongful act intentionally and without just cause or excuse." R. _____. (Emphasis added). The trial court's initial instruction also contained the "without just cause or excuse" language. Tr., at 1043.

The State objected to this instruction.

> The State's position is that the language "without just cause or excuse" should be removed from that jury charge. And the reasoning there is that there's no secret as to the defense's theory and what they pursued from the outset of this trial and through yesterday as it relates to putting forth evidence of Mr. Hughes's purported reasoning for committing this killing which was the danger that he believed (AM) was in due to what he believed to be

> was ongoing sexual abuse. The Court has ruled, ruled from the outset, ruled at the beginning of the defense's case that this is not a valid route to pursue, the defense of others is not a valid legal theory to pursue through this trial.

Tr.,at 1044. The State relied on the trial court's premature and erroneous ruling as the basis to exclude the "just cause or excuse" language.

Defense counsel responded, in part, by saying:

> Just simply because the State does not like the defendant's testimony and defense is not justification for trying to change the law. That is just simply black letter law. It's the definition of malice, and it's been the definition in every case that I've ever pulled up on the definition of malice.

Tr., at 1046. Defense counsel also explained to the trial court why the "just cause or excuse" language should still be charged even though the trial court had completely excluded, from the beginning, the defense of others and evidence in support of it.

> [W]hen Your Honor charges just cause, you know, just cause or excuse, that in no way -- that in no way in the context of malice is designed to talk about a legal defense. But it does go to what was in the defendant's mind which undercuts hatred, ill will wickedness, all the words that go with malice.

Tr., at 1054. The trial court excised the "just cause or excuse" language from its malice instruction.

> On page 11, the second paragraph, I am going to exclude the language "without just cause or excuse." I've looked at the Sellers case which is -- in some ways I feel like it's confusing more than it is enlightening. But I'm going to exclude that language. But I have read the Sellers case multiple times.

Tr., at 1073.

Defense counsel also requested a jury instruction on the defense of others, which the trial court also rejected. R.___, and tr., at 1053.

Defense counsel also objected to portions of the trial court's proposed jury instruction. Most notably, the trial court provided the jury with the following instruction in the context of "malice" for the murder charge.

> Malice aforethought may be either express or inferred. And these terms "express" and "inferred" do not mean different kinds of malice but merely the manner in which malice may be shown to exist, that is, either by direct evidence or by inference from the facts and circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. For example, any acts of preparation going to show that the deed was within the defendant's mind would be express malice.

Tr., at 1133 (emphasis added).

Prior to the trial court's instruction to the jury, defense counsel argued vigorously that this instruction constituted a comment on the facts by the trial court and should not be charged to the jury. Defense counsel expressed a concern that the instruction, as proposed, almost had the effect of declaring a directed verdict in favor of the State on the element of malice.

> State: Judge, we'd like to keep it in. I'm just reading through it. Hold on real quick. I think it's fine as is, Your Honor. But if there is a middle ground here, perhaps taking out "the lying in wait for" -- "lying in wait for a person" -- or "lying in wait for a person," and just going "prepared beforehand to do the act which was later accomplished, for example, any acts of preparation going to show that the deed was within the defendant's mind would be express malice."
>
> Defense counsel: Again, You Honor, I think that would still have enough similarity to some evidence that came into this case that it could be seen as a comment on the facts.
>
> State : I would just say I think that's cured by "any act in preparation."
>
> Court: I just -- I mean, consistently, again, I've made this charge, and, I mean, that is just an example of what can support a finding on malice.
>
> Defense counsel: I mean, it almost seems to just take away the jury's province in determining that issue. I mean, it basically says if someone does preparation, it's malice.
>
> Court: Okay. All right. I'll look at that.

Tr., at 1057-58. See also, tr., at 1073 (the trial court overrules defense counsel's objection to the "preparation" language in the trial court's express malice instruction.).

Closing Arguments, Jury Instruction, and Deliberations

The trial court's rulings practically stripped any vestige of law upon which defense counsel could rely going into closing arguments: the trial court had precluded them from introducing any evidence of defense of others before the defense case even began, it prevented defense counsel from offering any evidence of Parcell's and Post's sexual abuse of AM, even though the evidence was highly relevant to Hughes' theory of the case and the State had repeatedly opened the door to such evidence, and now, within a few hours of closing arguments, the trial court excised the "without just cause or excuse" language, black letter law, from its instruction to the jury. Defense counsel argued to the jury what remained: Hughes did not act with "malice," or an angry heart or wicked heart, when he killed Parcell. He acted to save a child, AM.

> And so in closing, I'm going to ask that you use your common sense that you brought with you to the courthouse and just ask yourself does a person who kills another person with the intent to save an innocent child, does that person have evil in their heart? Does that person have an angry heart? Ladies and gentlemen, I would suggest to you that your common sense would tell you no. And that person who killed another to save an innocent child is not a murderer. I would ask that you return a not guilty verdict.

Tr., at 1121.

After the lawyers completed their closing arguments and the trial court charged the jury, the jury left to deliberate. The jury came back with multiple questions. The most interesting question related to "malice." "Define malice. Is malice required for a murder charge?" Tr., at 1144-47. Ultimately, the trial court recharged the jury on "malice," and included in its instruction the same "preparation" language to which defense counsel had objected. Tr., at 1148.

The jury returned guilty verdicts against Hughes on all counts except Harassment 1st Degree, and Conspiracy to Harass 1st degree. Tr., at 1159-60.

Sentencing

After the trial court heard from the State, defense counsel, one of Parcell's relatives, and Hughes's father, the trial court imposed sentence: life imprisonment for Hughes. Tr., at 1160-71.

1. The trial court erred when it refused to instruct the jury on the defense of others, when Hughes was prepared to present evidence to the jury on each and every element of the defense of others sufficient to warrant a jury instruction on the defense of others.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Perry*, 440 S.C. 396, 403, 892 S.E.2d 273, 276 (2023) (internal quotation marks and citations omitted). Further,

> To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. [W]e are required to review the trial court's charge to the jury in its entirety."

Perry, 440 S.C. at 408, 892 S.E.2d at 279 (2023) (internal quotation marks and citations omitted).

Argument

Christina Parcell, AM's own mother, and Brad Post, Parcell's boyfriend, sexually abused AM for years. See *supra*, at pp. 15-16. AM was lawfully entitled to defend herself against her mother and Post, and Hughes stood in her shoes under the law when he acted to save her on October 13, 2021. See generally, *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997) (citations omitted). ("[O]ne is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense."); *State v. McCarty*, 437 S.C. 355, 370–71, 878 S.E.2d 902, 910 (2022) ("[A] person has the right to act in defense of another person if the person being protected would have had the right to kill the assailant in self-defense."); *State v. Sales*, 285 S.C. 113, 114, 328

S.E.2d 619, 620 (1985) ("The intervenor assumes the rights and limitations of the person he acts to protect. (Citation omitted)").

> If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error.

State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008) (citation omitted).

> Self-defense has four elements.
>
> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

McCarty, 437 S.C. at 369, 878 S.E.2d at 909–10 (citation omitted). The fourth element did not apply to this case because Hughes defended AM in her home, a place where AM had no duty to retreat. See *State v. Wiggins*, 330 S.C. 538, 548 n. 15, 500 S.E.2d 489, 494 n.15 (1998) ("There is no duty to retreat where an attack occurs in one's home or place of business."). If AM had no duty to retreat, then neither did Hughes. See *State v. Norris*, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) ("The right of the father to defend his daughter is coextensive with the right of the daughter to defend herself."); *State v. Sales*, 285 S.C. 113, 114, 328 S.E.2d 619, 620 (1985) ("A person attacked on his own premises, without fault, has the right to claim immunity from the law of retreat. (Citation omitted). Therefore, the appellant's sister had no duty to retreat. The intervenor assumes the rights and limitations of the person he acts to protect. (Citation omitted). The appellant thus had no duty to retreat, and the jury should have been so charged.").

The trial court's refusal to instruct the jury on the defense of others was error because it

analyzed self-defense/defense of others from both Hughes' perspective and AM's perspective instead of only from AM's perspective; because it placed additional elements on Hughes to establish self-defense and the defense of others that the law did not require; and because Hughes presented the trial court with ample evidence on each of the elements of self-defense for AM to warrant a jury instruction on the defense of others.

First, the trial court analyzed the self-defense/defense of others issue from an incorrect, hybrid perspective. In explaining why it refused to allow Hughes to pursue a defense of others defense, the trial court said this, in pertinent part:

> . . . I'm going to do as far as excluding defense of others. . . . (AM) was at school. There were other means of notifying law enforcement and -- if the defendant had proof of that danger or imminent harm. . . . . Mr. Hughes brought about the difficulty. Specifically, a defendant may not bring on the difficulty, in this case riding his bike and unlawfully entering the house and home of Parcell, and then offensively use the defense of others as a shield to his action.

Tr., at 831-32.

The trial court analyzed the issue from both AM's perspective and Hughes' perspective, whichever one was most conducive to defeating the defense. It referenced that AM was at school during the killing, indicating that Hughes stood in her shoes for the purpose of this element of self-defense. But, the trial court then analyzed the issue from Hughes' perspective when it declared "Mr. Hughes brought about the difficulty." See *supra*, at p. 36. Had the trial court analyzed the issue properly from AM's perspective, it would have been impossible for it to conclude that AM brought about the difficulty, the sexual abuse she suffered at the hands of her own mother and Post.[12] See *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997) (citations omitted). ("[O]ne

[12] One other example of the trial court improperly analyzing the issue from Zack's perspective. The trial court referenced on multiple occasions Zack's lack of knowledge and information about what was happening in the home. "[T]he defendant did not know Parcell." Tr., at 832. Although defense counsel introduced much evidence that demonstrated Zack reasonably believed

is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense.").

Second, the trial court placed a burden on Hughes in establishing self-defense/defense of others that the law did not require. In setting forth the elements of self-defense, the trial court stated:

> [T]he four elements that y'all have gone through that an individual is without fault in bringing on the difficulty, that there was an actual belief of imminent danger of losing life, sustaining bodily injury, that a reasonably prudent person of ordinary firmness and courage would have entertained the same belief, and then lastly, that there was no other probable means of avoiding the danger.

Tr., at 831 (emphasis added). Hughes was defending AM, who lived in the home where Parcell died. Therefore, AM had no duty to retreat and neither did Hughes. See *Wiggins, Norris*, and *Sales, supra* at p. 35.

The trial court also appeared to impose on Hughes an obligation to show that he had exhausted all alternatives prior to killing Parcell. "There were other means of notifying law enforcement and -- if the defendant had proof of that danger or imminent harm." Tr., at 832. The evidence clearly showed that Hughes and Mello took steps to report the sexual abuse and/or to stop it: Mello reported his concerns to the police in 2018, see *supra*, at p. 13, Hughes sent mailers to Parcell, Post, and their friends to protect other children who may have been at risk and to let Parcell and Post know they were being watched, he called DSS and reported abuse, and he completed an affidavit for the Family Court which set forth his concerns. See *supra*, at pp. 14 and 15. However, the law of self-defense/defense of others does not impose such a requirement.

AM was in danger, AM's knowledge of her mom and the sexual abuse is what counted. What she knew, not what Zack knew. See *supra*, at p. 34.

Compare *McCarty*, *supra*, at p. 35 (setting forth the elements of self-defense/defense of others) with *State v. Cole*, 304 S.C. 47, 50, 403 S.E.2d 117, 119 (1991) (citation omitted) (holding that the defense of necessity requires the defendant to show that "there is no other reasonable alternative, other than committing the crime, to avoid the threat of harm.").[13]

Third, Hughes presented the trial court with significant amounts of evidence on each of the elements of self-defense and defense of others as set forth by *McCarty*. See e.g., tr, at 818-826. Below is a brief summary of the evidence, from AM's perspective, which the trial court forced defense counsel to elicit via proffer but without objection from the State:

1. The defendant must be without fault in bringing on the difficulty. There is simply no argument that AM did anything to cause the sexual abuse she suffered at the hands of her own mother and Post. See generally c.f., *State v. Jackson*, 384 S.C. 29, 36, 681 S.E.2d 17, 20 (Ct. App. 2009)(internal quotation marks and citations omitted) ("Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide.").

2. The defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Parcell and Post sexually abused AM for years, taking thousands of sexually explicit videos and/or photographs of her. See tr., at 885-892, R ____. AM was well-acquainted with the sexual abuse she suffered at the hands of her mother and Post. Further, Investigator Dan Bevill would have testified that:

[13] Zack chose not raise necessity as a defense.

- He obtained a warrant for Post on October 19, 2021, six days after Parcell's death, for sexual exploitation of a minor in the 3rd degree after seeing images of child pornography on Post's cell phone; tr, at 863;
- After seeing the images on the phone, he began moving quickly for the purpose of taking AM into emergency protective custody; tr., at 863;
- "He would also testify that, after seeing those images, that -- and this is in his report -- that he knew that (AM) had been the subject of sexual abuse but . . . did not know the extent of the sexual abuse that (AM) was subject to and who from." Tr., at 863;
- The images he reviewed from Post's devices contained AM and Christina Parcell; tr., at 864;
- Based on his review of the images, the dates of Parcell's and Post's sexual abuse of AM began at least in January of 2018 and continued until October of 2021; tr., at 864-65;
- On October 20, 2021, he obtained additional warrant(s) for Post that constituted violent crimes under South Carolina law for more images of AM and Parcell he discovered on Post's devices; tr., at 865-66;
- "He would also talk about that, on that very same day, October 20, 2021, he followed up with the emergency protective custody process in the Family Court, that he knows the standard that is required for emergency protective custody, and specifically, he would acknowledge under 63-7-620 that the law required the law enforcement officer to establish probable cause that the child's life, health or physical safety is or was in substantial and imminent danger if the child was not taken into emergency protective custody. He would also testify that that very day, a Family Court judge made a

finding taking (AM) into emergency protective custody;" tr., at 866-67 (emphasis added); and

- He would testify that on November 23, 2021, he obtained a warrant for Post for CSC third degree with a minor after discovering an image from a Post device wherein Parcell was manipulating AM's genitalia with Parcell's fingers. Tr., at 867.

Defense counsel also was prepared to call Dr. David Corwin, a forensic psychiatrist, and, one the world's foremost experts on child sex abuse.[14] Corwin was the only witness the trial court allowed defense counsel to actually call[15] in the context of a proffer instead of summarizing the testimony, and Dr. Corwin testified as an expert in "the area of child psychiatry and child sexual abuse." Tr., at 906. He testified, in pertinent part, that:

- The production and distribution of child pornography is sex abuse.[16] Tr., at 916;

-"Child sexual abuse has been found through hundreds of studies over 40-plus years to be strongly associated with a variety of adverse outcomes that include the behavioral, the psychosocial affective meaning things like depression and anxiety. But also in the last 20 years or so, we've had more and more research on the biological effects, you know, partly because we've had brain imaging and we've been able to study the brains of abused and nonabused and sexually abused and nonabused children. And so we now know that child sexual abuse is one of the most toxic of the major stressors that a child can experience,

[14] See tr,, at 897-904, and R._____.

[15] The trial court did allow defense counsel also to call Investigator Bevill, but it did not allow defense counsel to elicit from Bevill testimony related to the defense of others. Tr., at 862.

[16] During his direct-examination of Dr. Corwin, defense counsel posed questions to Corwin that involved detailed characteristics of the images in this case to ensure that Corwin's testimony was relevant, probative, and concerned the specific child sex abuse AM suffered. See e.g., tr., at 918-19, R__.

broadly termed childhood adversities, and that it causes all of those harms including increased risk for suicide, suicidal ideations, suicide completion, substance abuse which too often ends in death. And so we know it's a very serious major stressor." Tr., at 907-08;

- Child sexual abuse "can accelerate aging and also is associated with shorter life span especially when combined with other stressors." Tr., at 909;
- "And we even have different studies that show which of the brain structures appear to be most affected by sexual abuse: the amygdala, which is a small part of the brain that's involved in processing threat and danger. The hippocampus is another area that's shown differences between sexually abused and nonabused children. Also some cortical areas. So there's a lot of very significant impacts, and we don't have good evidence that we can reverse many of these effects. It just appears that as these things are experienced and enter memory, the impacts accumulate. And so it's concerning." Tr., at 910;
- The brain is an organ of the body; tr., at 911;
- Child sexual abuse can also negatively affect the victim's heart (another organ); tr., at 911;
- Victims of child sexual abuse can pass the biological harm they suffered along to their children; tr., at 912; and
- Research indicates that adult, child sex abusers tend to continue to sexually abuse children without stopping; tr., at 920;

The evidence defense counsel sought to elicit through the testimony of Investigator Bevill, Clark Walton, Dr. Corwin, and others[17] clearly demonstrated that AM was in "imminent danger"

[17] Defense counsel painstakingly choreographed its evidentiary presentation also to satisfy the relevancy and authentication requirements contained in S.C.R.E. 401-403 and 901, to demonstrate

of "sustaining serious body injury or death." See c.f., S.C. Code Ann. § 16-11-430 (defining "Great bodily injury" for stand your ground purposes as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ.") (Emphasis added). See also, R., ___.

3. [I]f his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Under South Carolina law, Hughes stood in AM's shoes when he killed Parcell to save AM. If AM would have been capable of doing the same and chose to do so, the State would not and could not prosecute her: no one would have expected that child to endure another night of sexual abuse at the hands of her mother and Post.

In categorically excluding the substantial evidence defense counsel sought to introduce on the defense of others before even allowing defense counsel to attempt to introduce it and refusing to instruct the jury on the defense of others, the trial court based its ruling on a policy judgment and not the application of the law to the facts.

> Basically, defense is asking of this court, which is not the law of South Carolina, that essentially, a defendant can hear something, make assumptions on learning something about someone the defendant has no relationship and then go murder them. A defendant in this state cannot take the law into their own hands. I fully understand your argument, but it's not the law of South Carolina.

Tr., at 832-33.

Instead of applying the proffered evidence to the elements of the defense of others to

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that the evidence of sexual abuse of AM came from Post's devices, that the images and videos were of AM and Parcell, and that the abuse was occurring close in time to Parcell's death. See e.g., Proffer summaries of Chris Tsangarides, tr., at 871, Shannon McHale, tr., at 872, Wayne Arnette, tr., at 877, and Clark Walton, tr., at 885.

determine if "there (was) any evidence in the record from which it could reasonably be inferred that the defendant acted in (the defense of others)," *State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008) (citation omitted), the trial court contorted defense counsel's argument to serve as a platform from which to denounce vigilantism. However, a jury instruction on the defense of others was warranted because defense counsel produced significant, admissible[18] evidence on each of the elements of the defense of others, and the trial court's refusal to instruct the jury on the defense constituted reversible error.

One word about defense counsel submitting the evidence under proffer. Hughes acknowledges that the proffered evidence that warranted the defense of others instruction was not before the jury at the time the trial court instructed it on the law. However, the trial court made it impossible for defense counsel to even attempt to introduce this evidence before the jury when it ordered defense counsel to merely summarize the testimony and evidence under proffer outside the presence of the jury. Therefore, this Court should use this proffered evidence to determine whether the trial court should have instructed the jury on defense of others. See c.f., *State v. Richter*, 424 P.3d 402, 407 (Az. 2018) ("Here, Sophia supported her claim that she and her children were under the threat of immediate physical harm with proffered evidence of specific injuries and abuse. In so doing, she provided the slightest evidence of duress, and her proffer was therefore sufficient to support a duress defense. Thus, the trial court erred when it precluded her from raising a duress defense and from introducing evidence in support of that defense.").

In its trial brief, defense counsel provided the trial court with a roadmap of their plan to assert the defense of others and the evidence that supported the defense days before the trial started, R., at _____. Prior to the start of the defense case, defense counsel filed a response entitled

[18] Zack incorporates herein by reference his trial brief and his responsive pleading to the State's Motion to Exclude the Defense of Others, See R., ___ and ___.

"Defense Response to State's Motion to Prevent Defendant from Defending Himself," in which defense counsel publicly, for this first time, set forth this roadmap and the evidence to support it. In oral argument before the trial court, defense counsel explained in detail this roadmap. Finally, defense counsel, both through proffered, undisputed summaries of witnesses' testimonies and in witness testimony, established significant, powerful evidence on each of the elements of the defense of others.

Under these circumstances, the trial court's errors, both in excluding the defense of others at the outset of the trial before even allowing defense counsel to introduce its evidence and in continuing to exclude the defense after being exposed to Hughes' evidence, were profound and likely changed the outcome of the trial. https://www.fitsnews.com/2025/02/22/exclusive-rose-petal-murder-juror-details-deliberations-frustrations-behind-verdict/ (visited on October 15, 2025) ("Would the documentation of child porn (a.k.a. child sex abuse material, or "CSAM") in this case have swung the verdict? "If there is a sliver of proof to that, I think… I think the answer changes," (the juror) said. "You know, I'm not taking away what he did, like, is awful. Someone getting stabbed thirty-five times – that should never happen. But I just, I don't think there were enough facts in that case for there to be a final answer, right?") (emphasis added).

2. The trial court erred when it improperly commented on the facts and evidence by instructing the jury that if one plans or prepares to kill another than one acts with malice for the purpose of murder.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Perry*, 440 S.C. 396, 403, 892 S.E.2d 273, 276 (2023)(citation and internal quotation marks omitted). "Errors, including erroneous jury instructions, are subject to harmless error analysis. When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not

contribute to the verdict (emphasis added)." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) (citations and internal quotation marks omitted).

Argument

> When the trial court tells the jury it may use evidence of [particular facts] to establish the existence of malice, a critical element of the charge of murder, *the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury.* Even telling the jury that it is to give evidence of [a particular fact] only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence.

State v. Brown, 443 S.C. 196, 199, 904 S.E.2d 448, 450 (2024) (citing and quoting *State v. Burdette*, 427 S.C. 490, 502–03, 832 S.E.2d 575, 582 (2019)).

During Hughes' direct examination, the following exchange took place between defense counsel and Hughes:

Defense counsel:	Hughes, let's talk about that. So you -- once you concluded, believed absolutely this was what you had to do, did you go about planning?
Hughes:	Yes. I planned very carefully to make sure, one, like I said, that no one else would be involved in this, and two, I knew that if I tried to do this and failed, it would only be worse for (AM).

Tr., at 1017. Hughes then testified, in detail, about the materials he gathered and the tasks he performed to accomplish his goal of protecting AM, the steps he took to minimize the danger to third parties and to break any link his presence in the home could have with Mello. Tr., at 1018-24.

In closing arguments, the lawyers specifically referenced Hughes' planning and how it interfaced with the element of "malice" in the context of murder. Specifically, defense counsel said this, in part, about Hughes' planning and malice.

> Let's talk about the other -- let's talk about the elephant in the room. Let's just talk about it that (the State) discussed, the planning, right? Let's talk about that. Hughes was very honest when he testified about the planning. He told you in detail what he did. In a lot of cases, planning can be good evidence in a lot of cases. As (the State) said, this is a very unique case, and probably one of the most unique aspects about this case is that the person who

> Hughes believed posed the danger was the mother to her own child. Think about that. This isn't where you're home and an intruder comes in you don't know and it's a spur of the moment. This isn't a random interaction or difficulty. This is what Hughes believed. This is a mother, the person who's charged with caring for your child, most importantly, the person on the whole planet who is supposed to be the most nurturing, this is the person who was doing this to the child, the person who lives with the child, the evidence was the person who shared a room with the child, the person who was with the child all the time. So in a situation like that where you have a belief that's grounded on documents, that's grounded on information shared with you over many, many months, when you have that belief, how do you alleviate that threat, the threat from the mom without thinking through how to do it? How do you do that? So I would submit to you, ladies and gentlemen, that the planning in this case, unlike most any other case, doesn't show malice because the mom was the threat. The mom was the one who posed the danger.

Tr., at 1114-15.

Over defense counsel's objection, the trial court instructed the jury that "malice" for the purposes of murder can be "express" or "inferred." Tr., at 1133. In the context of "express" malice, the trial court specifically instructed the jury

> Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. For example, **any acts of preparation going to show that the deed was within the defendant's mind would be express malice**.

Tr., at 1133 (emphasis added).

The jury asked its first question(s) after beginning to deliberate: "Define malice. Is malice required for a murder charge?" Tr., at 1144. Again, the trial court repeated its "express malice" instruction, which was the last instruction the jury heard on murder prior to resuming its deliberations. Tr., at 1148 (emphasis added).

> Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. For example, **any acts of preparation going to show that the deed was within the defendant's mind would be express malice.**

By telling the jury that "acts of preparation. . . would be express malice" for the purposes of murder, the trial court *"directly commented upon facts in evidence (*Hughes' testimony about his planning and preparation and evidence the State introduced in its case-in-chief related to the

assailant's preparation), *elevated those facts, and emphasized them to the jury."* *Brown*, supra at p. 45. "A jury instruction that (express) malice may be (proven by acts of preparation) is an improper court-sponsored emphasis of a fact in evidence— (that Hughes planned the killing) and it should (not) be permitted." *State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019). The trial court did what South Carolina law clearly forbids, and such an instruction was clear error. See generally, *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582. ("We have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven.") (Citations omitted). See also generally, *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013) ("Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts."); see also, e.g., *State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) ("[W]e believe that the 'law of flight' in a judge's charge places undue emphasis upon that part of circumstantial evidence and it should not be charged hereafter.").

Further, this error was harmful and potentially devastating to Hughes' defense. It contributed to the jury 's verdict. The very first question the jury had related to the "malice" in the trial court's jury instruction on murder. See *supra*, at p. 33. Not only did the trial court improperly comment on the facts in its initial instruction, but it repeated that erroneous instruction a second time in response to the jury's first question.

> It is reasonable to assume that the jury had, at this point, focused critical attention on the meaning of (malice). . . and was in the process of deciding upon its verdict based upon (this meaning), but wanted to be readvised of the definition(). . . . The additional words which the trial judge would relay to the jury would be given special consideration by the jury since they were in response to its own inquiry. Under these circumstances the charge of the

trial judge constituted prejudicial error requiring a new trial.

State v. Blassingame, 271 S.C. 44, 46–47, 244 S.E.2d 528, 530 (1978), *holding modified on other grounds* by *State v. Patton,* 322 S.C. 408, 472 S.E.2d 245 (1996)).

3. The trial court erred when it refused to charge the jury that to prove malice for Murder the State had to prove that Hughes acted without "just cause or excuse."

Standard of Review

A trial court's refusal to give a requested jury instruction will be reviewed for abuse of discretion and will not be reversed absent a showing of prejudice. See *supra* at p. 34.

Argument

The trial court erred by refusing to instruct the jury that malice means "the intentional doing of a wrongful act without just cause or excuse." That phrase is not optional, it is a longstanding and repeatedly approved component of the legal definition of malice in South Carolina. It was also directly relevant to the defense theory presented at trial. Defense counsel expressly relied upon this definition as early as opening statement, and the requested language was included in the defense's proposed jury charges. The omission of the phrase was error, and it was prejudicial to Hughes.

South Carolina courts have consistently held that malice is "the doing of a wrongful act intentionally and without just cause or excuse." *Tate v. State*, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002) (overruled on other grounds*)*; *In re Tracy B.*, 391 S.C. 51, 57, 704 S.E.2d 71, 74 (Ct. App. 2010); *State v. Bell*, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991), *cert. denied* 502 U.S. 1028, 112 S.Ct.888, 116 L.E.2d 791 (1992). The Supreme Court has reaffirmed this definition repeatedly. Although the precise wording of the malice definition varies slightly from case to case, the phrase "without just cause or excuse" appears consistently. As recently as *State v. Campbell*, a charge was approved that instructed the jury that malice is "the intentional doing of a wrongful act without

just cause or excuse and with an intent to inflict an injury." 443 S.C. 182, 189, 904 S.E.2d 441, 445 (2024). Likewise, in *Law v. S.C. Dep't of Corrections*, the Court emphasized that malice is "the deliberate intentional doing of an act without just cause or excuse." 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). The phrase is therefore not an explanatory aside; it is an essential component of the legal definition of malice.

The State urged the trial court to omit the phrase based on its interpretation of *State v. Sellers*, 442 S.C. 140, 898 S.E.2d 116 (2024). But *Sellers* is materially distinguishable. In *Sellers*, the only contested issue at trial was identity – whether Sellers was the killer. There was no evidence of self-defense, legal excuse, or any other justification for the homicide. Because justification for the homicide was not in play at all, the phrase "without just cause or excuse" had no relevance to the issues before the *Sellers* jury. Under those circumstances, the Supreme Court understandably questioned what the phrase would have added and whether it needed to be charged at all. However, the *Sellers* court ultimately concluded that although the language may not have been relevant or helpful to the jury's fact-finding task in that case, it was not error to instruct the jury this way.

This case is the opposite of *Sellers*. Here, the reason for the homicide, or the *why* behind the killing as defense counsel put it during opening statements, was central to the defense from the outset. Tr., at 848. Defense counsel told the jury that Hughes would testify that he killed Parcell for a "just cause" and that the jurors would hear why he acted. *Id*. Defense counsel emphasized: "You're going to hear that this was done for a just cause. And that's not malice and that's not murder." Tr., at 848. Thus, unlike *Sellers*, justification was squarely at issue, explicitly raised by the defense, and supported by evidence at trial.

Hughes testified that he believed Parcell was abusing her daughter; that he had repeatedly attempted to alert DSS, the guardian ad litem, family court, and law enforcement. He maintained that he acted only because he believed Parcell posed an imminent danger to the child. That

testimony, whether ultimately accepted or not, placed "just cause or excuse" firmly as an issue. If the trial court in *Sellers* instruction on "without just cause or excuse" was not error when the defendant's justification or intent was not an issue, then the trial court's failure to charge this language when it was practically "the" issue in Hughes' case was definitely error. Because the law requires malice to be the intentional doing of a wrongful act **without just cause or excuse**, the jury could not evaluate Hughes' defense without being instructed on this essential component of malice.

During the charge conference, the State objected to defense counsel's proposed malice instruction and invoked *Sellers* as the basis for removing the phrase from the Court's instructions to the jury. Tr., at 1043-44. Defense counsel responded with multiple cases, including *In re Tracy B.*, *Singletary*, and *Kinnard*, reaffirming the traditional definition of malice. Tr., at 1046. Despite this authority, and notwithstanding the sharp factual distinction from *Sellers*, the trial court adopted the State's position and removed the phrase. Tr., at 1073. The trial court adopted its own instruction, defining malice as:

> hatred, ill will or hostility towards another person. It is the intentional doing of a wrongful act and with an intent to inflict an injury or under circumstances that the law will infer an evil intent

Tr., at 1132. Defense counsel renewed its objection after the jury retired. Tr., at 1142.

The prejudice resulting from the omission became even clearer during deliberations. The jury submitted a written question asking: "Define malice. Is malice required for a murder charge?" Tr., at 1143; R. ____. This question underscored the jury's confusion about the very concept the court had incompletely defined. When the court re-charged the jury, it repeated the same incomplete definition and again excluded the "without just cause or excuse" phrase. Tr. 1147–48. Defense counsel reaffirmed the objection. Tr., at 1148.

South Carolina law is clear that a trial court's refusal to instruct the jury on a correct, applicable legal principle is reversible when the omission is prejudicial. The definition of malice repeatedly adopted by South Carolina appellate courts includes the phrase "without just cause or excuse." The defense's entire theory rested on Hughes' explanation for why he acted as he did, an explanation that directly invoked justification. The omission deprived the jury of the legal standard necessary to evaluate that defense. The jury's own confusion and request for clarification further demonstrates the significance of the omission. See also, *supra* at pp. 47-48.

4. The trial court erred when it excluded evidence of Bradly Post's participation in the production and/or distribution of child pornography, even though he "opened the door" to such evidence while testifying on cross-examination pretrial.

Standard of Review

South Carolina appellate courts "review a trial court's ruling on the admission or exclusion of evidence—when the ruling is based on the South Carolina Rules of Evidence—under an abuse of discretion standard." *State v. Wallace*, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023) (citations omitted). See also, *State v. McEachern*, 399 S.C. 125, 136, 731 S.E.2d 604, 609 (Ct. App. 2012) (concluding that the defendant had "opened the door" to otherwise inadmissible evidence and stating 't]he admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Clark*, 444 S.C. 606, 611, 910 S.E.2d 481, 484 (2024) (internal quotation marks and citations omitted). See also, *State v. Blake*, 442 S.C. 295, 312, 898 S.E.2d 184, 193 (Ct. App. 2024) (holding that the trial court did not abuse its discretion after allowing the State to cross-examine the Defendant with otherwise inadmissible evidence and stating "[t]he State was permitted to respond to Blake's incomplete—and demonstrably false—

explanation. . . .").

Argument

The trial court erred when it excluded evidence of child pornography even after Bradly Post lied and denied that he was working with Parcell to produce and distribute it.[19] See *supra*, at p. 18-19. "[O]therwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. Shands*, 424 S.C. 106, 124, 817 S.E.2d 524, 533 (Ct. App. 2018) (internal quotation marks and citations omitted). "When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." *State v. McEachern*, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012) (internal quotation marks and citations omitted). See also, generally, *United States v. Spotted Bear*, 920 F.3d 1199, 1201 (8th Cir. 2019) (referencing a defense lawyer's opening statement as evidence the defendant "opened the door," and stating "[w]hen a criminal defendant creates a false or misleading impression on an issue, we have held the government may clarify, rebut, or complete [the] issue with what would otherwise [be] inadmissible evidence. . . . "); *State v. Wood*, 580 S.W.3d 566, 577 (Mo. 2019) (internal quotation marks and citations omitted) ("[A] party can open the door to the admission of evidence with a theory presented in an opening statement, or through cross-examination.").

While testifying on cross-examination in a pretrial hearing, Bradly Post, a State's witness,

[19] The trial court also erred when it ruled, prior to trial and before the parties offered any testimony or exhibits, that all evidence of child pornography would be excluded. See generally, *Tompkins v. Eckerd*, 2012 WL 1110069, at *2 (D.S.C. Apr. 3, 2012) (citations and internal quotation marks omitted) ("Motions in limine that seek exclusion of broad and unspecific categories of evidence, however, are generally disfavored. Courts have recognized that it is almost always better situated during the actual trial to assess the value and utility of evidence. Therefore, when confronted with the situation, **a better practice is to deal with questions of admissibility of evidence as they arise [in actual trial]** as opposed to tackling the matter in a vacuum on a motion in limine.").

denied producing and/or distributing child pornography in conjunction with Parcell. See *supra*, at p. 18. He could have asserted his 5th Amendment right and refused to answer that question. However, Post did answer the question and explicitly denied it. When he chose to answer untruthfully, Post opened the door to evidence that would show the jury that he was lying, and defense counsel was prepared to continue his cross-examination of Post and/or introduce evidence to the trial court and to the jury, in the form of images of child pornography involving Parcell, Post, and/or AM that showed he lied. R. _____

The trial court refused to allow defense counsel to introduce the child pornography evidence, both in the pretrial hearing and before the jury. "I'm not going back, and I'm not going to change my earlier ruling." See *supra*, at p. 19.

> The purpose of a motion *in limine* is to prevent disclosure of potentially prejudicial matter to the jury. A ruling on the motion is not the ultimate disposition on the admissibility of evidence. It remains subject to change based upon developments during trial.

State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988) (internal citations omitted) (affirming the trial court's amendment of its ruling in limine and allowing the State to cross-examine defense witnesses on topics previously ruled off limits based on the answers these witnesses provided on direct-examination that opened the door). The trial court's failure to allow defense counsel to introduce child pornography evidence, both in the pretrial hearing and before the jury, to impeach Post constituted an abuse of discretion: the trial court's ruling in limine was preliminary, and its insistence on "not going back" to its ruling constituted an error of law when the State's witness clearly opened the door for the admission of the child pornography evidence.[20]

[20] The fact that Post opened the door to the child pornography in a pretrial hearing versus before the jury makes no difference: he opened the door to the child pornography evidence, and Zack should have been able to introduce this evidence both before the trial court in the pretrial hearing and before the jury at trial. See *People v. Ripic*, 228 A.D.2d 714, 715 (N.Y. Sup. Ct. App. Div. 1996) ("Having been forewarned (pretrial) that defense counsel disputed Rowe's ability to have conferred with defendant at the police station, the People were at liberty to put forth any proof

5. The trial court erred when it excluded evidence of Christina Parcell's participation in the production and/or distribution of child pornography, even though the State "opened the door" to such evidence during Vanessa Kormylo's direct examination.

Standard of Review

The appropriate standard of review for this issue is abuse of discretion. See *supra*, at p. 51.

Argument

Vanessa Kormylo served as the *guardian ad litem* for AM during John Mello's and Christina Parcell's most recent custody dispute over AM. The State called Kormylo in its case-in-chief to provide testimony about the bitterness of the custody dispute and to presumably provide the jury with the context of what was happening between Mello and Parcell in October of 2021. However, during its direct examination of Kormylo, the State unwittingly opened the door to the child pornography evidence.

> State: Had you been asked to make the recommendation, would you have recommended (AM) to stay with Christina Parcell?
>
> Kormylo: Yes. . . . [M]y position is that she was thriving there. . . . [S]he was doing so well in her mother's custody. . . . ***So at the time, yes, that would have been my recommendation if we had gone to trial before the mother's murder.***

See *supra*, at 21. (Emphasis added). Defense counsel sought permission to question Kormylo on cross-examination about what her recommendation would have been after Parcell's death and why it would have changed. See *supra*, at pp. 21-22. The trial court refused to allow this questioning, but it did allow defense counsel to proffer his questions and Kormylo's answers.

relevant to that issue (at trial).").

Kormylo candidly testified in her proffer that if she knew then what she knew now, that Parcell and Post were sexually abusing AM and creating child pornography, she would have had AM separated from her mother immediately. See *supra*, at p.22.

A primary component of Hughes' defense was that he acted to save AM, and he had concerns that AM was in danger. Kormylo's testimony, qualified and limited to her recommendation as to AM's placement prior to Parcell's death, left the jury with the incomplete, inaccurate, and false impression that AM was "thriving" as of October 13, 2021. See *supra*, at p. 21. Hughes had every right to correct this false impression by introducing at least some evidence of Kormylo's change of heart after Parcell's death and the reasons for it. See *State v. Northcutt*, 372 S.C. 207, 221, 641 S.E.2d 873, 880 (2007) ("The prosecution had opened the door for Appellant to present evidence of his remorse. Appellant is entitled to rebut the State's argument and correct the false impression the State conveyed to the jury."). When the trial court improperly excluded any evidence of Kormylo's change of heart and why, it severely undercut Hughes' ability to respond to the State's misleading evidence and to support a defense. The trial court abused its discretion. See c.f, *Northcutt*, 372 S.C. at 221, 641 S.E.2d at 880 (holding that "[t]he trial judge erroneously excluded the evidence" the defendant sought to introduce that would have corrected the false impression the State's evidence left the jury.).

6. The trial court erred when it prevented Hughes from telling the jury why he killed Christina Parcell.

Standard of Review

> [T]he right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify is either respected or denied; its deprivation cannot be harmless. As such, the error is structural in that it is so basic to a fair trial that [its] infraction can never be treated as harmless error.

State v. Rivera, 402 S.C. 225, 249–50, 741 S.E.2d 694, 707 (2013) (citations and internal quotation

marks omitted).[21]

The trial court's refusal, under any circumstances, to admit evidence of the sexual abuse that AM suffered at the hands of her own mother and Post, especially during Hughes' testimony constituted structural error and should be reviewed on this basis.[22]

Argument

Hughes had a constitutional right to tell the jury why he killed Christina Parcell, the trial court misapplied the Rules of Evidence in preventing him from doing so, and more fundamentally, the Rules of Evidence (whether applied properly or not) should never serve to prevent a defendant in a murder case from telling the jury why the defendant killed another person.

> The right of a criminally accused to testify or not to testify is fundamental. [F]undamental to a personal defense ... is an accused's right to present his own version of the events in his own words.

Rivera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013) (citations and internal quotation marks omitted). Further, "it is difficult to fathom anything more logically connected to the fundamental issue in this ( ) murder trial than a defendant's own testimony about the killing." *Rivera*, 402 S.C. at 244, 741 S.E.2d at 704 (citations omitted).

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[21] Zack acknowledges that *Rivera* dealt with the trial court's refusal to allow the defendant to testify at all instead of imposing a restriction on the defendant's testimony. However, he believes that the restriction the trial court imposed, preventing him from telling the jury why he did what he did, so fundamentally limited his testimony that the restriction had a similar impact as if Zack had not testified at all. See *Koon v. Rushton*, 2007 WL 2903945, at *5 (D.S.C. 2007) (quoting *Rock v. Arkansas,* 483 U.S. 44, 55 (1987) (emphasis in original) **("Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony."**).

[22] Should this Court decline to conclude that the trial court's error was structural, its error still constituted both an abuse of discretion and harmful error. Evidence of a defendant's intent in a murder case is highly probative, and the jury was clearly focused on Zack's intent, as evidence by their first question in their deliberations revolving around the trial court's malice instruction. See tr., at 1143-44, and R. ____.

In categorically excluding the child pornography evidence before the trial even started, the trial court misapplied the Rules of Evidence.

> I find that it is not relevant under Rule 401, 402. This evidence has no tendency to make the existence of any fact that is of consequence to this murder more or less likely. It will not assist the jury at arriving at the truth of this murder. The question is did the defendant commit this murder, and that's the only issue. The child pornography is not relevant.

Tr., at 121.

The State tried Hughes on five different charges, see *supra*, at p. 12, each of which had different elements. The "only issue" in the case was not whether Hughes "committed this murder," but instead whether the State proved beyond a reasonable doubt each and every element of the offenses for which it was prosecuting Hughes. The child pornography, evidence that AM was being sexually abused, Hughes' belief that A.M was being abused, and/or his desire to protect AM from the sexual abuse was highly relevant to multiple elements of the offenses for which he was standing trial. For example, (1) in the context of murder, this evidence both undercut the State's evidence of malice, see e.g., tr., at 193 ("[M]urder is an angry heart. We have to show that Hughes had an angry heart, he was mad"), and supported a defense of others jury instruction, see *supra* at pp. 34-44; (2) in the context of burglary 1st degree, this evidence both undercut the State's proof that Hughes entered the dwelling without consent[23] and that when he entered he intended to commit a crime (instead he sought to protect AM), see S.C. Code Ann. § 16-11-311 (defining burglary, in part, as the entering of a dwelling without consent "with the intent to commit a crime"); and (3) in the context of harassment, this evidence corroborated both Hughes' belief that Parcell was dangerous to children and that he sent the mailers not to harass her and Post but to protect other children in the neighborhood from Parcell and Post, see tr., at 1000 and S.C. Code Ann. §

[23] Zack stood in AM's shoes when he entered the residence, see *supra*, at p. 34, and it was partially her dwelling.

16-3-1700(a) (defining "harassment," in part, as "a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose. . . ." (Emphasis added)). The scope of relevance for this evidence under the Rules of Evidence was far broader than "did the Defendant commit the murder," and the trial court misapplied the Rules when it applied the concept of relevance through this myopic lens.

The trial court further misapplied the Rules of Evidence when it relied on the case of *State v. Cottrell*[24] as a basis for preventing Hughes from testifying as to why he killed Parcell. See tr. at 839-41. *Cottrell* was a death penalty case in which the South Carolina Supreme Court merely reaffirmed the obvious notion that "[t]he right to present a defense is not without limits, and the right does not allow criminal defendants to present any evidence regardless of its admissibility under the rules of evidence." *Cottrell*, 421 S.C. at 639, 809 S.E.2d at 433.

In *Cottrell,* the State tried Cottrell for capital murder after he murdered a police officer in the parking lot of a Dunkin' Donuts in Myrtle Beach. The police officer made contact at the Dunkin' Donuts with Cottrell after he received information from Detective Johnson that Cottrell was a suspect in another murder. At trial, Cottrell wanted to call Johnson as a defense witness to show that the police officer did not have reasonable suspicion to detain him prior to the shooting, making the police officer's detention of him unlawful.

The trial court barred Cottrell from calling Johnson as witness pursuant to justifications found is S.C.R.E. 403, however, "the trial judge left the door open for Cottrell to call any witness he wished, including Johnson, to contradict or impeach anything . . . regarding the information that was passed to (the deceased police officer)." *Cottrell*, 421 S.C. at 639, 809 S.E.2d at 433. Cottrell

[24] The trial court did not provide a citation for *Cottrell*, but the only South Carolina case appellate counsel could find that is remotely applicable is *State v. Cottrell*, 421 S.C. 622, 809 S.E.2d 423 (2017).

decided not to call Johson nor any other witnesses for impeachment purposes. Ultimately, the South Carolina Supreme Court painstakingly analyzed the particular facts of that case to determine that the trial court's decision to exclude the evidence was appropriate under the circumstances.

Other than stating an obvious axiom, *Cottrell* provided no basis for the trial court's decision to categorically exclude all evidence of child pornography or Hughes' testimony which would have explained why he killed Parcell. The evidentiary exclusion in *Cottrell* had nothing to do with a defendant's testimony or the defendant's right to testify. Further, the issue implicated by the exclusion in *Cottrell*, whether the police officer had sufficient information to detain Cottrell, was far more removed from Cottrell's case than the heart of Hughes' case, why he killed Parcell. Finally, *Cottrell* actually rejects the notion that trial courts should categorically exclude evidence: the Supreme Court in *Cottrell* included the trial court's decision to allow the excluded evidence under some circumstances likely because the *Cottrell* court believed its willingness to allow the evidence for a different purpose was important. See *supra,* at p. 58.

As the *Rivera* court stated

> [T]he Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote.... Here, because the trial court committed an error of law in finding Appellant's testimony was irrelevant and unfairly prejudicial, such erroneous application of the Rules of Evidence cannot serve any legitimate state purpose.

Rivera, 402 S.C. at 245, 741 S.E.2d at 704–05 (internal quotation marks and citations omitted). Clearly, the "end(s)" that the South Carolina Rules of Evidence seek to "promote" is/are "that the truth may be ascertained and proceedings justly determined." S.C.R.E. 102. The trial court's misapplication of the Rules of Evidence that resulted in Hughes' inability to tell the jury why he killed Parcell violated his Constitutional Rights: the trial court's ruling prevented the jury from ascertaining the truth and justly determining the proceedings. Hughes' testimony about the nature of the threat AM faced, sex abuse, and his concerns grounded in this threat were "highly probative.

It tended to show motive and intent, and it completed the (defense's) theory of the case." *State v. Sweat*, 362 S.C. 117, 129, 606 S.E.2d 508, 515 (Ct. App. 2004).

The trial court's misapplication of the Rules of Evidence was "disproportionate to the ends" the Rules "were asserted to promote," and require reversal of Hughes' convictions. See also *Rivera*, 402 S.C. at 245, 741 S.E.2d at 705 ("[B]ecause the trial court committed an error of law in finding Appellant's testimony was irrelevant and unfairly prejudicial, such erroneous application of the Rules of Evidence cannot serve any legitimate state purpose.").

Even if this Court were to somehow hold that the trial court properly applied the Rules of Evidence to limit Hughes' testimony, such a limitation would still violate Hughes' constitutional rights. The South Carolina Supreme Court, in *Rivera*, left open the possibility that a trial court's proper application of the Rules of Evidence in limiting a defendant's testimony could still violate that defendant's constitutional rights. "[W]e need not address whether proper application of the South Carolina Rules of Evidence impermissibly restricts a defendant's constitutional right to testify" *Rivera*, 402 S.C. at 246, 741 S.E.2d at 705.[25]

The trial court ordered Hughes not to reference the sexual abuse that AM suffered at the hands of her own mother and Post, which was Hughes' entire motivation for taking Parcell's life. It asked Hughes if he could abide by these instructions, and Hughes said he would do his "best." See *supra*, at p. 30. Hughes properly noted the conflict between the trial court's instructions and the oath he took to tell the whole truth. See *supra*, at p. 30.

> Where a defendant's intent is in issue he should be permitted to testify as to his motive and actual intent or state of mind. *Crawford v. United States*, 212 U.S. 183, 202-203, 29 S.Ct. 260, 53 L.Ed. 465; *United States v. Edwards*, 458 F.2d 875, 884 (5th Cir.); *Whiting v.*

[25] The *Rivera* court further elucidated the inquiry in footnote 3. "We do not suggest that a defendant's testimony is not subject to the rules of evidence. Indeed, our findings should not be taken as a restriction of the trial court's ability to constrain a defendant's testimony based on a *proper* application of evidentiary rules." *Rivera*, 402 S.C. at 246, 741 S.E.2d at 705.

> *United States*, 296 F.2d 512, 519 (1st Cir.); *United States v. Kyle*, 257 F.2d 559 (2d Cir.), cert. denied sub. nom., *United States v. Gardner*, 358 U.S. 927, 79 S.Ct. 312, 3 L.Ed.2d 301; *Krogmann v. United States*, 225 F.2d 220, 229 (6th Cir.); *Collazo v. United States*, 90 U.S.App.D.C. 241, 196 F.2d 573, 581, cert. denied, 343 U.S. 968, 72 S.Ct. 1065, 96 L.Ed. 1364; *Haigler v. United States*, 172 F.2d 986, 988 (10th Cir.). The fact that the issue of his intent is before the jury does not bar a defendant from his right to face the jurors and tell them his intentions and motives. *Crawford v. United States*, supra, 212 U.S. at 202-203, 29 S.Ct. 260. And he is entitled to testify whether he would have done the acts in question if inducements or pressures claimed had not existed. *Whiting v. United States*, supra, 296 F. 2d at 519.

United States v. Hayes, 477 F.2d 868, 873 (10th Cir. 1973). See also, *State v. Waldschmidt*, 546 P.3d 716, 736 (Kan. 2024) ("A defendant can testify about their own intent if relevant.") (quoting *Hayes*, 477 F.2d at 873, and 23 C.J.S., Criminal Procedure and Rights of Accused § 1052 ("Generally, the defendant may testify directly as to the defendant's own uncommunicated intent or motive if it is material."); *People v. Sergey*, 485 N.E.2d 506, 509 (Ill. Ct. App. 1985) (citations omitted) ("In criminal cases where the intention, motive, or belief of the defendant is material to the issue of guilt, a defendant has a right to testify directly to that fact.").

Put simply, a defendant charged with murder, the most serious criminal offense in existence, who admits, under oath, to a jury that he or she killed a person has a constitutional right to tell the jury why he or she did it, regardless of what the Rules of Evidence say. See c.f., *State v. Williams,* 465 P.3d 1053, 1062 (Hawaii 2020) (holding that the trial court's restrictions on the Williams' testimony violated his constitutional right to present a complete defense and stating "[t]he circuit court's curtailment of the defendant's testimony as to his state of mind at the time he committed the offense bespeaks a misapprehension of the discretion available to the court. It is for the jury to evaluate the strength of the defendant's claim of self-defense with full opportunity to observe a defendant's complete presentation of the evidence that allegedly caused the accused to act in self-defense.").

7. The trial court erred when it held Hughes in contempt for violating an unlawful order.

Standard of Review

> "This court will reverse a trial court's decision regarding contempt only if it is without evidentiary support or is an abuse of discretion. An abuse of discretion can occur where the trial court's ruling is based on an error of law." *First Union Nat'l Bank v. First Citizens Bank & Trust Co. of South Carolina,* 346 S.C. 462, 466, 551 S.E.2d 301, 303 (Ct.App.2001) (citations omitted).

Rhoad v. State, 372 S.C. 100, 105, 641 S.E.2d 35, 37 (Ct. App. 2007).

Argument

The trial court abused its discretion when it held Hughes in contempt of court: by adhering to a preconceived, arbitrary, immutable and categorical ban on all sexual abuse evidence, the trial court improperly applied the law when it ordered Hughes not to mention anything related to AM's sexual abuse.

This brief has explained in great detail why evidence of AM's sexual abuse by her own mother and by Post should have been admitted in Hughes' trial: the State opened the door to this evidence, both in Post's pretrial testimony and in Kormylo's testimony before the jury, see *supra*, at pp. 17-22, this evidence was admissible in Hughes' case-in-chief to show he properly and legally acted in defense of AM, see *supra*, at pp. 34-44; and in the cross-examination of Post to show his pending charges involved AM as the victim, see *supra* at p. 17.

By the time Hughes testified, this evidence should have been put before the jury days earlier. Had the trial court ruled properly that the evidence of sexual abuse of AM was admissible, no need to bar Hughes from discussing this topic, at least in its entirety, would have existed. The trial court's repeated and persistent refusal to admit this evidence under any circumstances constituted an abuse of discretion. This abuse of discretion formed the basis for the trial court's

order prohibiting Hughes from discussing the sexual abuse in his testimony. Therefore, the trial court also abused its discretion in holding Hughes in contempt of court and sentencing him to 6 months imprisonment when the order the trial court claimed Hughes violated was based on an erroneous application of the Rules of Evidence.

Further, "it is well settled that a party may not be held in contempt for violation of a void order. . . . A void judgment is one that, from its inception, is a complete nullity and is without legal effect." *Kosciusko v. Parham*, 428 S.C. 481, 491–92, 836 S.E.2d 362, 368 (Ct. App. 2019) (internal quotation marks and citations omitted). An order that violates the U.S. Constitution is void. See cf. e.g. *In re Henry*, 154 S.W.3d 594, 596 (Tex. 2005) (releasing a defendant who had been held in both criminal and civil contempt for failing to comply with a court order, and stating "[a] commitment order that violates the Texas Constitution is beyond the court's power and is void.").

Hughes killed Parcell to save AM because he believed Parcell and Post were sexually abusing her, and he was right. He had a constitutional right to tell this to the jury, and the trial court violated his constitutional right to present a complete defense when it ordered Hughes silenced. See *supra*, at p. 29. The trial court's unconstitutional order was void, Hughes had no obligation to obey it, and the trial court's imprisonment of Hughes for six months was error. See generally, *Long v. McMillan*, 226 S.C. 598, 609, 86 S.E.2d 477, 482 (1955) (citation omitted) ("[D]isobedience of a void Order, Judgment, or Decree, or one issued without jurisdiction of subject matter and parties litigant, is not contempt.").

8. The trial court erred when it prevented Hughes from asking Bradly Post on cross-examination about the nature of his pending charges and the possible penalties he faced if convicted of these charges.

Standard of Review

Appellate courts in South Carolina review a trial court's limitation on cross-examination for abuse of discretion. See generally, *State v. Perez*, 423 S.C. 491, 496, 816 S.E.2d 550, 553

(2018) (internal quotation marks, citations, and emphasis omitted) ("This Court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion.").

Argument

S.C.R.E. 611(b) is entitled "[t]he Scope of Cross-Examination," and reads "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." (Emphasis added). The Rules of Evidence explicitly allow for the cross-examination of witnesses for bias.

> Rule 608(c), SCRE, provides that "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c) "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'"

State v. Sims, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) (citations omitted). "Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate." *State v. Mizzell*, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002).

In particular, South Carolina courts have routinely held that a witness's pending charges and possible sentences are fair game on cross-examination. See e.g., *State v. Curry*, 370 S.C. 674, 681, 636 S.E.2d 649, 652 (Ct. App. 2006) ("[W]e find the trial court erred in barring the cross-examination of (the State's witnesses) on the possible sentences they faced."); *State v. Gillian*, 360 S.C. 433, 449, 602 S.E.2d 62, 70 (Ct. App. 2004), *aff'd as modified on other grounds*, 373 S.C. 601, 646 S.E.2d 872 (2007) ("Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial

possibility [the witness] would give biased testimony in an effort to have the solicitor highlight to [a] future [court] how the witness cooperated in the instant case. Accordingly, the trial court erred in excluding evidence concerning Page's possible sentence." (Citations and internal quotation marks omitted)).

In *Mizell*, the State tried the Mizell brothers for burglary, grand larceny, and possession of a weapon during the commission of a violent crime. The Mizell brothers sought to cross-examine a co-conspirator and State's witness, Steele, about the possible penalties he faced in connection with his pending charges, the same charges the Mizell brothers faced. The trial court allowed defense counsel to question Steele about the nature of the charges he faced and, in general, about the possible sentences he faced. However, the trial court excluded evidence related to the specific, possible sentences Steele faced. A jury ultimately convicted both brothers on lesser-included charges.

On appeal, the Supreme Court reversed both the Court of Appeals and the trial court, holding that the trial court erred when it restricted the Mizell brothers' cross-examination.

> The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency. Accordingly, we conclude the Court of Appeals erred in holding the trial judge properly excluded testimony concerning Steele's potential sentence if convicted of the same crimes as petitioners.

Mizzell, 349 S.C. at 333, 563 S.E.2d at 318.

Like Steele in *Mizell*, Post had no deal with the State. Tr., at 169. Like Steele, Post's "lack of a negotiated plea, if anything, create[d] a situation where the witness (was) more likely to engage in biased testimony in order to obtain a future recommendation for leniency." *Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318.

Not only did the trial court's restriction on cross-examination violate Hughes' Sixth

Amendment rights under the U.S. Constitution, the South Carolina Rules of Evidence, and South Carolina common law, the restriction clearly constituted an "abuse of discretion" under the phrase's classic definition.

"An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." (Emphasis added). *State v. Clark*, 444 S.C. 606, 611, 910 S.E.2d 481, 484 (2024) (internal quotation marks and citations omitted). The trial court said this, in pertinent part, as the basis for its restriction on defense counsel's cross-examination of Post:

> But Mr. Post, he's going to stand -- or he's going to have his day in court, and he's going to have to -- you know, but he's not -- he's not pled and he's not been tried yet. He's not a codefendant. He's not an eyewitness to the actual crime. He basically found the body of his girlfriend/fiancee, and he's going to be here testifying under subpoena. And it's my understanding he's testifying to finding the body, reporting the murder which is corroborated by the 9-1-1 phone call and the investigator. The victim was his girlfriend, and he is a victim of harassment. He does have serious charges against him, but these are pending, again, and he's innocent until he's proven guilty. And he will have a trial. Also, the Attorney General's Office will handle this trial, not the Greenville solicitor's office. He's not a cooperating witness. He's not providing any type of inculpatory, I guess, evidence linking the defendant to the crime. So they're not offering him in any way to -- like I said, to inculpate the defendant of any type of wrongdoing or indication of guilt.

Tr., at 122. Put simply, there is no basis in the law for denying a defendant the ability to cross-examine a witness on pending charges or possible penalties because the witness (1) "has not pled and ( ) not been tried yet;" (2) "is not a codefendant;" (3) "is not an eyewitness to the actual crime;" and/or (4) "the Attorney General's Office will handle his trial, not the Greenville solicitor's office."

Also, the trial court's factual recitations in its analysis have no "evidentiary support." For example, the trial court's assertion that Post was "not a cooperating witness" is incorrect. Post was and is charged with crimes being prosecuted by the State, and the State was prosecuting Hughes. Post testified willingly: he did not move to quash the State's trial subpoena, and, upon

information and belief, he and/or his lawyers met with the State to prepare for his testimony in Hughes' trial.

Moreover, the trial court's assertion that Post was "not providing any type of inculpatory. . . evidence linking the defendant to the crime" was completely inaccurate. For example, both in his pretrial testimony and his trial testimony, Post testified that Mello and Parcell were engaged in a bitter custody battle over their daughter, AM. Tr., at 127, 214-15. The State repeatedly mentioned the custody battle throughout its case-in-chief and statements to the jury. In fact, the State posited to the jury at the beginning the trial, in its opening statement, that the custody battle was the motive for Hughes' killing of Parcell.

> Zack Hughes began inserting himself into this custody battle at the behest of John Mello. And they began doing things like sending photos of her to the neighbors in an effort to shame her. Have to show that she's a bad mother. And as the custody dispute elevated, it elevated into a situation where custody might not go in John Mello's favor. And at that point, Zack Hughes made the ultimate decision.

Tr., at 194 (emphasis added). The State pounded on this theme all the way through its closing argument.

> And Zack Hughes did it the same way he committed this murder. . . . But the big point of the harassment is not that that's bad to do to somebody. It's really what Tina Parcell referred to as revenge porn. South Carolina does not have a statute for revenge porn. We have harassment. And that's exactly what that is. But he's really doing it, one, to make her look bad, to make her look like a prostitute. But he's also trying to do it to gain a strategic advantage in this custody battle.

Tr., at 1090-91 (emphasis added). Post's testimony on the custody battle between Parcell and Mello allowed the State to explain to the jury why Hughes would kill a stranger, evidence that aided the State in proving that Hughes was the killer in its case-in-chief, and evidence that he acted maliciously after he testified in the defense case-in-chief. Post's testimony was definitely inculpatory, the trial court's assertion to the contrary lacked any evidentiary support, and the restriction on cross-examination based on this and other assertions was flat wrong.

The State's own argument, wherein it began to apply the harmless error analysis, clearly demonstrated that even it knew it was error for the trial court to impose this restriction on cross-examination.

> State: And that's noted in Delaware v. Van Arsdall when they are reviewing this for harmless error analysis. And the importance of that particular witness's testimony is, I believe, the first factor that they analyze. . . .
>
> Defense counsel: And, Your Honor, just very briefly, what (the State) was talking about right there goes into the analysis of whether it's harmless error or not, not whether it's error. So it is clearly error not to allow these questions to be asked of the witness. . . .

Tr., at 117-18.

9. The trial court erred when it admitted State's Exhibit 9 and testimony as to the contents of State's Exhibit 9 in the absence of sufficient evidence establishing a chain of custody in violation of S.C.R.E. 901 and 403.

Standard of Review

South Carolina appellate courts review the admission of evidence based on the failure to establish chain of custody on an abuse of discretion standard. *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id*.

Argument

During the testimony of Investigator Jonathan Garrett, the State moved to admit State's Exhibit 9. At that point, the only facts established about this exhibit were that it was "a white plastic bag with a white powder substance" found in the living room of the crime scene. Tr., at 257. Defense counsel objected, explaining "I don't think the full foundation has been laid – has been completed for 9 in order to be entered into evidence." Tr., at 259. Apparently agreeing, the trial court instructed the State: "Lay the foundation, Counsel." Tr., at 259.

Taking the Court's instruction at face value, the State made no effort to develop the chain of custody and instead shifted its attention to Garrett's credentials, in an apparent effort to "lay a foundation." The State asked a series of questions designed to bolster Garrett's drug investigation credentials, his ability to recognize controlled substances, and his experience performing field presumptive field tests. Tr., at 259. The State then asked only a single question related to chain of custody, and it received an evasive, nonspecific response:

State: After that field test was conducted, what did you do thereafter with State's Exhibit 9?

Garrett: It was ultimately secured in the Property and Evidence section at the Greenville County Law Enforcement Center.

State: So it was thereafter submitted into evidence?

Garrett: It was.

Tr., at 259-60.

Having offered nothing to advance the chain of custody foundation, the State nonetheless moved to admit the Exhibit. Defense counsel renewed his objection: "Your Honor … [t]here hasn't been a full chain established yet … until that happens, we would have an objection to it being entered." Tr., at 259. The State asserted that chain of custody was not required, despite Exhibit 9 being indisputably fungible, and the trial court agreed.

State: Your Honor, a full chain doesn't need to be established at this point. This is the individual that collected State's Exhibit 9. At this point in time, the foundation's been laid for whatever may be introduced.

Court: I agree. Your objection is noted on the record.

Tr., at 260.

On cross examination, Garrett testified that he and Investigator Sparkman took Exhibit 9 to the Property and Evidence room together later that same day and that Sparkman logged the evidence in. Tr., at 263. Garrett did not identify the Property and Evidence employee who received

Exhibit 9 nor did he discuss any procedures used in the transfer. When Sparkman later testified, he was not asked, nor did he testify, about Exhibit 9 at all.

Forensic chemist Kristen McCall testified after Garrett and opined that Exhibit 9 contained 4.97 grams of cocaine. Tr., at 273. Before offering this opinion, she described her general procedures for retrieving evidence from Property and Evidence. She explained that she may receive up to 60 items at a time. Tr., at 270. She also discussed the care she takes in ensuring items are properly sealed before testing:

> [W]hen I receive my stuff, I make sure it's sealed by the officer. And if it's not, it goes back down to Property and Evidence because you want to make sure your evidence is sealed because that means that somebody could have tampered with it. So if it was open, I take it back down to Property and I say, "I'm not working this item. You need to get the officer to fix this." So when it gets fixed I will go back down there and I will get the item.

Tr., at 270.

McCall then identified Exhibit 9 by noting her initials and the date on what she described as "the officer's bag that he sealed it in." Tr., at 271. This was the first and only testimony suggesting that the exhibit had been sealed in any bag. Garrett never testified that he sealed the item at the scene or that he saw Sparkman seal it. Sparkman provided no testimony about Exhibit 9 whatsoever. No Property and Evidence witness testified about how Exhibit 9 was received, packaged, stored, or handled. Although McCall explained in detail her practice of returning any item that appears unsealed or tampered with, she never stated whether Exhibit 9 arrived sealed in the first place or whether she had to return it for correction. Thus, even this critical step in her own quality control process was left entirely to speculation. In short, the State never identified the officer who supposedly sealed the item, and, in fact, the record ultimately leaves uncertain whether it was ever sealed at all.

When the State asked McCall to state her conclusion about the white powder contained in Exhibit 9, Defense counsel objected.

Defense counsel: … I would object from the standpoint of Rule 901 for the purpose of authentication … the State has to establish from beginning to end because it's fungible who handled it, what they did with it. The probative value of her opinion … is nil because there's been no … full chain of custody established as to what happened from the time it was seized until the time this witness tested it. So with that we would object pursuant to 403.

The Court: And I would overrule. And your objection is noted for the record.

Tr., at 271-72.

The white powder substance later identified as cocaine was indisputably fungible evidence. South Carolina has "long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)); *State v. Pulley*, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018). Gaps in handling cannot be left to speculation. Where evidence "has passed through several hands," the chain is inadequate if the record "leave[s] it to conjecture as to who had it and what was done with it between the taking and the analysis." *Sweet*, 374 S.C. at 6, 647 S.E.2d at 205; *Benton v. Pellum*, 232 S.C. 26, 33–34, 100 S.E.2d 534, 537 (1957). The chain must identify those who handled the evidence and "reasonably demonstrate the manner of handling." *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206.

Missing links render fungible evidence inadmissible. "Evidence is inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the substance was not established at least as far as practicable." *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). Courts permit minor gaps only where other proof accounts for the item's secure handling. Courts may overlook a missing witness only when other evidence clearly establishes who handled the evidence, how it was preserved, that seals were intact, and that

standard procedures ensured integrity. *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206; *Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55.

The trial courts' discretion must account for risk of tampering and the nature of the item. Whether the chain has been established "as far as practicable" depends on "the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." *Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55. (quoting *United States v. De Larosa*, 450 F.2d 1057, 1068 (3d Cir. 1971)).

Viewed against this legal framework, Exhibit 9's chain of custody was not established. The State identified no one at Property and Evidence who received Exhibit 9. Garrett's testimony that the item was "ultimately secured" is exactly the type of speculative, nonspecific statement that courts have condemned as leaving handling "to conjecture." See *Sweet*, 374 S.C. at 6, 647 S.E.2d at 205. According to Garrett, Sparkman logged the evidence. However, Sparkman provided no testimony at all about Exhibit 9. No witness testified to sealing the item, though the chemist, McCall, later assumed someone had done so. McCall described rigorous sealing protocols but never testified whether Exhibit 9 arrived sealed or whether she had to return it for correction.

In addition, the State introduced no Property and Evidence logs or other documentation. In cases such as *State v. Trapp*, courts were willing to overlook a missing witness because robust documentary or testimonial safeguards existed to verify handling. 420 S.C. 217, 231-32, 801 S.E.2d 742, 749-50 (Ct. App. 2017). Producing such records was plainly practicable here: Garrett testified that he was looking at the chain of custody **while he was on the witness stand**. The State's failure to introduce these readily available records is mystifying.

In cases where chain of custody was deemed adequate, the State provided detailed testimony regarding such matters as who sealed the evidence, how it was packaged, who transported it, how it arrived at the lab, and whether seals were intact. Here, none of those

foundational requirements were met. The State presented no evidence of the manner of handling during the period between seizure and forensic testing, the precise deficiency that cases such as *Sweet, Benton*, and *Carter* identified as a missing link that renders fungible evidence inadmissible. The chain of custody for Exhibit 9 was not established as far as practicable, and the trial court erred in admitting it.

10. The trial court erred in admitting State's Exhibits 94, 95, 96, 97, and 100 and the expert's DNA testimony where the State failed to establish a proper chain of custody as required by S.C.R.E. 901.

Standard of Review

South Carolina appellate courts review the admission of evidence based on the failure to establish chain of custody on an abuse of discretion standard. See *supra,* at p. 68.

Argument

The trial court permitted DNA analyst Tim Nafzigger to testify that DNA obtained from Parcell's right fingernails matched a known sample from Hughes.[26] Tr., at 790. This testimony was admitted despite the State's failure to establish a proper chain of custody for the evidence underlying his opinion.

South Carolina law has long required that "a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011). Whether the State has met this burden "depends on the unique factual circumstances of each case." *Id*, 392 S.C. at 93, 708 S.E.2d at 754 (quoting *S.C.Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 629 n.1, 614 S.E.2d 642, 646 n.1 (2005)).

[26] Stating the match "is approximately 825 million times more likely than a coincidental match to a random unrelated individual." Tr., at 789-90

Where a substance passes through multiple hands, "the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture." *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). See also *State v. Pulley*, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206 (citing *State v. Taylor*, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct. App. 2004)). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Id*. "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001).

Emboldened by its success in introducing the bag of the unknown powder found in Parcell's home through the first officer who handled it, the State attempted to follow the same approach to introduce clippings from Parcell's fingernails and Parcell's DNA sample. Forensic Technician Kaylen Ford testified that she attended Parcell's autopsy and collected, among other things, those items. Tr., at 375. Immediately thereafter the State sought to admit Parcell's fingernails, Exhibits 94 and 95, and Parcell's DNA sample, Exhibit 96 and 97, into evidence – before establishing any additional links in the chain of custody or even eliciting testimony about what Ford did with the items after collecting them. Tr., at 375-76. When arguing for the admissibility of these items, the State took the position that evidence, whether it be fungible or not, becomes admissible solely through the testimony of the person who initially collects it. The trial court declined to admit the items at that time, but it assured the State that it would admit the items after an unidentified witness testified – a witness whose role with respect to the evidence had not yet even been discussed.

State: Your Honor, at this time, the State moves into evidence State's Exhibit 94 through 97.

Defense counsel: Your Honor, I object to the introduction at this time in that the chain of custody has not been established. These are fungible items, so it would not be proper until the chain is established.

Court: Will you be putting them in later through another witness?

State: We'll have testimony through another witness, **but she is the collector of these items**.

Court: Well, until that time, they'll just remain marked.

State: Understood.

Court: **You can put them in at that time**.

Tr., at 375-376 (emphasis added).

The State then elicited nothing of any consequence from Ford regarding her handling of Parcell's fingernails or DNA samples.

State: On taking these samples being the fingernail samples and the buccal swabs, what thereafter do you do with them?

Ford: I take them and I submit them to our Property and Evidence section.

State: Presumably for testing?

Ford: Yes.

Tr., at 376.

The State pursued no further details about the submission process at the Property and Evidence department: no date of submission, no indication of who received the evidence (or whether it was submitted to a person at all as opposed to being left in a drop box), no information about how the evidence was packaged at Property and Evidence, and nothing about the items' whereabouts or condition between the time Ford collected them and the unspecified time she submitted them.

The State was no more forthcoming about the collection, submission, and retention of Hughes' DNA sample, Exhibit 100. Although the State elicited from Ford that she collected Hughes' buccal swabs, Tr., at 473, the State asked nothing about when the collection occurred, where it took place, or the circumstances that prompted her to take the swabs from Hughes. The handling and submission of the DNA evidence was left even more opaque than the handling of Parcell's fingernails and DNA swabs. When asked what she did with the buccal swabs after collecting them, Ford sidestepped the question and responded using the passive voice: "They were submitted into evidence." Tr., at 473-74. Not only did the State never explain when or how the evidence was submitted, it never even revealed who submitted it.

No one from Property and Evidence was called to testify about Parcell's fingernails, Parcell's DNA sample, or Hughes' DNA sample. Consequently, the critical information as to when the evidence was received, how it was packaged, how many individuals handled it, the identities of those individuals, and when the evidence was released, was all left to conjecture. The two DNA laboratory employees who testified, serologist Hannah Burbage and DNA analyst Timothy Nafzigger, shed no additional light as to when the evidence came to the lab or the handling of the evidence during the period between Ford's collection of it and its eventual arrival in their custody.

The State, likewise, presented no Property and Evidence intake logs or evidence invoices. Although Burbage referenced in passing a "digital barcoding system which is a digital chain of custody," tr., at 761, the State introduced no records or output from that system. In fact, the State never even established whether the evidence related to the testimony of the alleged DNA match was scanned into it. When describing the process of retrieving evidence from Property and Evidence, Burbage testified only that evidence is "**usually** scanned into my custody." Tr., at 761 (emphasis added).

In seeking to establish the admissibility of the evidence supporting its alleged DNA match, the State made virtually no effort to account for a chain of custody. Instead, it relied exclusively on testimony from the final recipient that the evidence did not appear to have been tampered with. That approach is insufficient under South Carolina law. As the Supreme Court explained in *Hatcher*, "the mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody. Evidence is still required as to how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be." 392 S.C. at 95, 708 S.E.2d at 755.

Pursuant to South Carolina Rule of Evidence Rule 901, the proponent of evidence must present "evidence sufficient to support a finding that the matter in question is what its proponent claims." When the item is fungible, such as DNA material, the only way to satisfy Rule 901 is through a properly established chain of custody. Accordingly, when a trial court admits fungible evidence despite the State's failure to establish a complete chain of custody as far as practicable, the court necessarily admits evidence that has not been authenticated under Rule 901. This constitutes legal error, which is an abuse of discretion.

11. The trial court erred when it refused to grant Hughes' motion for a directed verdict on the harassment indictment on the basis that the statute is unconstitutionally vague.

Standard of Review

When considering the constitutionality of a statute, South Carolina appellate courts "must uphold the statute unless [they] find beyond a reasonable doubt it does not conform to the constitution." *Owens v. Stirling*, 443 S.C. 246, 260, 904 S.E.2d 580, 587 (2024). "The party challenging the constitutionality of a statute bears the burden of proving it is unconstitutional." *Powell v. Keel*, 433 S.C. 457, 461, 860 S.E.2d 344, 346 (2021). The South Carolina Supreme Court

has recognized "that it is a grave matter to overturn, by judicial construction, an enactment of the General Assembly. All presumptions are in favor of the power of that body to enact the law.... But when the unconstitutionality of an Act is clear to this Court, beyond a reasonable doubt, then it is its plain duty to say so." *Thomas v. Mackleen*, 86 S.C. 290, 305, 195 S.E.2d 539, 545 (1938).

Argument

Hughes' indictment for harassment[27] alleged that between April 1 and August 10, 2021,[28] he did "commit the offense of harassment by engaging in a pattern of words or conduct of intentional, substantial, and/or unreasonable intrusion into the private life of Christina Parcell that would cause a person in her situation to suffer mental distress." The indictment did not specify whether the State was charging harassment in the first or second degree, and instead merely recited the generic statutory language common to both degrees of harassment. After the close of the State's case, the Defense moved for a directed verdict on the ground that the statute is unconstitutionally vague. The trial court denied the motion.

Harassment in both the first and second degree is defined as:

> a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress.

S.C. Code Ann. § 16-3-1700(A), (B). The only ostensible distinction between the two degrees appears in the nonexclusive example lists that follow the definitional sentence. Subsection (A), defining first degree harassment (a felony) states that the offense "may include, but is not limited to" conduct such as following a targeted person, unwanted contact after notice, surveilling or maintaining a presence near locations where the targeted person may be found, and vandalism.

[27] Indictment number 2024-GS-23-005412.

[28] The indictment originally alleged an end date of July 17, 2021; however, prior to trial, the Court amended that date upon motion by the State and without objection from the defense.

Subsection (B), defining second degree harassment (a misdemeanor), uses the same qualifier, "may include, but is not limited to," and provides as an example "verbal, written, or electronic contact that is initiated, maintained, or repeated." S.C. Code Ann. § 16-3-1700(B). Because both example lists are explicitly non-exhaustive, they neither supply clear statutory elements nor meaningfully differentiate the two degrees of harassment.

Due process requires both clear notice and meaningful standards governing enforcement. A criminal statute is unconstitutionally vague if " '(1) it does not provide fair notice of the conduct proscribed,' or '(2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed[.]' " *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 505, 757 S.E.2d 388, 392 (2014) (quoting *In re Gentry*, 142 Mich.App. 701, 705, 369 N.W.2d 889, 893 (1985)); see also *Whitehurst v. Town of Sullivan's Island*, 446 S.C. 137, 149, 919 S.E.2d 402, 409 (2025). As the United States Supreme Court explained in *Grayned v. City of Rockford*:

> if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

408 U.S. 104, 108, 92 S.Ct. 2294, 2229 (1972).

These two requirements, fair notice and constrained enforcement discretion, are independent and equally essential. *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 473–74 (1993). And as the dissent in *Whitehurst* observes, the requirement that statutes meaningfully limit enforcement discretion is the "more important" aspect of vagueness analysis. 446 S.C. at 159–60, 919 S.E.2d at 415 (Kittredge, J., dissenting).

South Carolina's harassment statute is unconstitutionally vague because the two degrees contain identical elements and indistinguishable scope. Both definitions employ the same operative language and require the same conduct, mental state, and resulting harm. The only

purported distinction lies in nonexclusive, illustrative example lists, both of which are introduced by the phrase "may include, but is not limited to" which, by definition, does not define or limit the degrees of the offense. As a result, the statute provides no meaningful basis for differentiating first degree harassment from second degree harassment and fails to give fair notice of what conduct is felonious versus misdemeanor.

This is not an abstract problem. As the trial record shows, the parties and the trial court spent significant time attempting – unsuccessfully – to determine the scope and meaning of the statute. Tr., at 17-20, 803–05, and 1075-76. Defense counsel contended repeatedly that the statute was indecipherable. While discussing jury instructions, defense counsel cited *State v. Neuman*, 384 S.C. 395, 683 S.E.2d 268 (2009), and argued: "That's exactly what we've all been doing for this past week and a half—just trying to guess what this statute is supposed to say." Tr., at 1075-76. The State responded that it "acknowledges it's not a perfect statute" and attempted to rely on the example lists for guidance, underscoring the absence of real statutory standards. Tr., at 1077. The trial court itself struggled to interpret the statute, stating at one point that it was "written a little funky." Tr. 805. When neither the parties nor the trial court can interpret the statute, due process is violated. See *Grayned*, 408 U.S. at 108–09, 92 S.Ct. at 2228-29.

These difficulties are not mere interpretative disagreements; they reflect a statute so lacking in standards that "person(s) of common intelligence 'must necessarily guess at its meaning and differ as to its application.' " *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001) (quoting *Toussaint v. State Bd. of Med. Exam'rs,* 303 S.C. 316, 320 400 S.E.2d 488, 491 (1991), see also *Neuman*, 384 S.C. at 402, 683 S.E.2d at 271. A statute that allows prosecutors, courts, and juries to classify identical conduct as either misdemeanor or felony harassment, without any statutory guidance, fails both prongs of the vagueness test. *See Michelle G.*, 407 S.C. at 505, 757 S.E.2d at 392; *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 784 (4th Cir. 2023).

The statute is also unconstitutionally vague as applied to the facts of the case. The State's case rested entirely on written communications, conduct which is expressly listed only in second degree examples in subsection (B). The State nonetheless prosecuted the case as first degree harassment by relying solely on the statute's open ended definitional language, thereby elevating the identical conduct from a misdemeanor to a felony without any statutory standard authorizing that distinction. Because the statute provides no workable, objective basis for distinguishing first from second degree harassment, the jury was asked to speculate as to the controlling legal boundary. This lack of guidance renders the statute unconstitutionally vague as applied.

A defendant may raise an as-applied vagueness challenge when a statute fails to provide fair notice under the specific facts of the case. *Neuman*, 384 S.C. at 402, 683 S.E.2d at 271. That is precisely what occurred here. Nothing in the statute alerted Hughes that the conduct alleged by the State – written communication – could expose him to felony liability. The statute's indeterminate language gave the State, effectively, unbounded discretion to categorize the same conduct as either first or second degree harassment.

Because §§ 16-3-1700(A) and (B) define first and second degree harassment using identical operative language and distinguish them only through nonexclusive lists of examples, the statute provides neither fair notice nor meaningful standards for enforcement. It is unconstitutionally vague both on its face and as applied in this case. Hughes' conviction for harassment must therefore be reversed.

12. The trial court erred in denying Hughes' motions for directed verdict on the harassment and conspiracy charges because the State presented no evidence that Parcell suffered mental or emotional distress and no evidence of any non-legitimate intent.

Standard of Review

South Carolina appellate courts "review the denial of a directed verdict motion in a criminal case under the any evidence standard of review." *State v. Cain*, 419 S.C. 24, 33, 795 S.E.2d 846, 851 (2017). "On appeal from the denial of a directed verdict, appellate courts must view the evidence and reasonable inferences in the light most favorable to the State. If there is either any direct evidence or any substantial circumstantial evidence reasonably tending to prove the defendant's guilt, appellate courts must find that the trial judge properly submitted the case to the jury." *State v. Larmand*, 415 S.C. 23, 29, 780 S.E.2d 892, 895 (2015) (citations omitted), see also *State v. Cherry,* 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004) and *State v. Harris*, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015).

Argument

Defense counsel moved for a directed verdict at the close of the State's case and renewed the motion, adding additional grounds, at the close of the defense case. The defense identified two independent and dispositive gaps in the State's proof. The trial court's refusal to grant the motion at either stage was error.

At the close of the State's case, the defense first emphasized that the record contained no evidence whatsoever that Parcell suffered mental or emotional distress. South Carolina's harassment statute, both first and second degree, defines harassment as

> a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress.

S.C. Code Ann. § 16-3-1700(A) and (B). Under this statute, the State was required to prove two distinct emotional distress elements with regard to the harassment indictment[29]: (1) that Christina

[29] Indictment number 2024-GS-23-005412.

Parcell, the alleged victim, *actually* experienced mental or emotional distress and (2) that the conduct would cause a reasonable person in Parcell's position to experience such distress.

The conspiracy indictment[30] alleges that Hughes "willfully and unlawfully combined with John Mello for the purpose of accomplishing an unlawful object or a lawful object by unlawful means, to wit: Harassment 1st degree." Because the conspiracy charge was expressly predicated on the harassment statute, a conviction required the same dual showing of emotional distress – both that Parcell actually experienced mental or emotional distress and that a reasonable person in her position would have experienced such distress.

At the close of the State's case, defense counsel moved for a directed verdict on the harassment and conspiracy charges on the ground that no evidence in the record showed that Parcell suffered any mental or emotional distress. Tr., at 799. In response, the State focused almost entirely on the reasonable person component of the statute, effectively ignoring the conjunctive "and" in the definition, and argued that the distress element was satisfied solely by showing how a hypothetical reasonable person would react. Tr., at 800-01. As to the statutory requirement that Parcell herself actually experienced distress, the State simply sidestepped its burden, asserting that this prong was irrelevant because Parcell was deceased. In doing so, the State failed to acknowledge that any actual distress could have been established through the multiple witnesses who interacted with Parcell after the mailings and testified at trial, had such distress ever existed. And on this critical element, the State offered only a single insufficient point: that Parcell reported the alleged crime. The trial court denied the Hughes' motion. Tr., at 802.

Defense counsel articulated its position on the distress element in its directed verdict motion:

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[30] Indictment number 2024-GS-23-005413.

> There is absolutely no evidence that Christina Parcell did, in fact, suffer mental or emotional distress… no testimony that she was crying, no testimony that she said she was upset… absolutely no testimony, no evidence… that she did, in fact, suffer or these mailings caused mental or emotional distress.

Tr., at 799.

The record fully supports that assertion. Not a single State witness testified that Parcell exhibited any emotional reaction to the mailings. To the contrary, the uncontroverted testimony showed that every witness who interacted with Parcell at or near the time she received the envelopes observed no signs of distress. Brad Post, who lived with Parcell, was with her when she first examined the contents, and personally collected mailers from neighbors, offered no testimony that she cried, was shaken, appeared fearful, expressed anxiety, or otherwise displayed distress. Tr., at 237–38, 490–91.

Law enforcement witnesses likewise described no emotional reaction from Parcell. Dan Bevill, whom Parcell contacted directly to report the mailings, met with Parcell, collected the envelopes from her, and documented her complaint. Bevill's testimony contained no indication that Parcell appeared upset, emotional, frightened, or distraught. Tr., 543–44. Postal Inspector Mike Nicholson, who also interacted with Parcell about the mailings, similarly offered no testimony that she exhibited distress, made any statements reflecting emotional impact, or appeared shaken or upset. Tr., at 545.

These three witnesses, each called by the State, were uniquely positioned to observe Parcell's demeanor contemporaneously with the alleged harassment. Had Parcell experienced actual emotional distress, the State could have elicited such evidence from any of them. It did not. The record is silent. The same is true of Parcell's neighbors. The evidence showed that multiple mailings were delivered to neighboring houses and that Parcell and Post retrieved those envelopes. Investigator Bevill confirmed that when he met with Parcell and Post, they had "already gotten

envelopes at their house as well as neighboring houses, and they wanted to hand them over to us." Tr., at 516. These neighbors were likewise in a position to observe Parcell's demeanor when the mailings were discovered or retrieved. Yet the State called none of them to testify to any emotional distress.

When these arguments were raised at the directed verdict stage, the State offered no rebuttal because none was possible. Rather than identifying evidence of actual distress, the State attempted to redefine the statutory element, arguing that harassment turns solely on a reasonable-person standard. Tr. 800–01. On the only point relevant to actual distress, the State's lone argument was that Parcell "reported the crime." Id. But reporting a crime was not evidence of emotional distress; it is a routine, neutral act and cannot satisfy the statute's requirement that the victim "suffer mental or emotional distress."

At the close of the defense case, defense counsel renewed the directed verdict motion on the harassment and conspiracy charges, again noting the complete absence of evidence that the mailings caused Parcell actual emotional distress. Tr., at 1068. Defense counsel further argued that the motion was even stronger at this stage because the defense case had introduced evidence demonstrating that the mailings were sent for legitimate reasons. The defense therefore added an additional, independent basis for directed verdict: the State's failure to prove that the mailings "served no legitimate purpose," an essential element under § 16-3-1700(A), (B). As defense counsel summarized:

> The State is not able to prove that the mailings were sent for no legitimate purpose. The three purposes that Hughes testified to… are, in fact, legitimate purposes; and therefore, the State, as a matter of law, cannot meet its burden on the harassment charge.

Tr. 1067–68.

As defense counsel explained, Hughes testified that he sent the mailers for legitimate reasons, unified by a single theme: the protection of children generally and the protection of one

vulnerable child in particular – AM. Hughes testified that he believed parents in the surrounding community needed to know that Parcell was not someone who should be trusted with children. Tr., at 1000. His direct examination made clear that he viewed Parcell's carefully cultivated public image as concealing dangerous conduct toward her daughter, and that alerting other parents was necessary to protect their children from the risks he believed she posed.

Hughes also testified that he hoped the mailings would disrupt Parcell's social façade so that others might recognize her true conduct and prompt her to stop the abusive behavior he believed was occurring behind closed doors. He described Parcell as someone who "controlled her emotions" and maintained an outward appearance inconsistent with her private behavior.

In addition, Hughes explained that he sent the mailers to alert individuals in positions of authority, such as the guardian ad litem, family court personnel, law enforcement, and others in the hope that they would finally act to protect Parcell's daughter. Both his testimony and counsel's argument emphasized that he had already attempted more formal channels, including writing an affidavit and contacting DSS, yet no one intervened despite what he perceived as mounting danger to the child. Tr., at 1002-03.

As defense counsel argued, these child-protective purposes, grounded in months of accumulating information, were legitimate. The State introduced no evidence to contradict any of them, leaving the statutory element requiring proof that the mailings served "no legitimate purpose" entirely unmet. Its response at the directed verdict stage cited no evidence bearing on purpose, and it identified not a single fact from the record to negate the legitimate purposes to which Hughes testified. Tr., at 1067–68. Without evidence that the mailings served *no* legitimate purpose, the State failed to prove an indispensable element of both degrees of harassment and of conspiracy to commit harassment of either degree.

In sum, the State failed to introduce evidence on two indispensable elements of harassment: it presented no evidence that Christina Parcell actually suffered mental or emotional distress and no evidence that the mailings served *no* legitimate purpose. Because the conspiracy charge depended on proof of an underlying unlawful act (harassment), it likewise failed for lack of evidence on the same grounds. Where the State's proof is silent on elements our Legislature has made mandatory, a directed verdict is required as a matter of law. The trial court's refusal to grant directed verdicts on both harassment and conspiracy was therefore reversible error.

CONCLUSION

For the foregoing reasons, Zachary Hughes respectfully requests that his convictions and sentences be reversed and vacated.

Respectfully submitted,

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